INDEX.

ABANDONMENT.

See LANDS AND LAND TITLES, 3, 4, 5, 6.

ABATEMENT.

See ATTACHMENT, 1.

ACCOUNT.

See MORTGAGE, 11.

1. Where there are mutual running accounts, and the last item on the credit side is within the period which would be a bar by the statute of limitations, the whole account is saved from the operation of the statute. *Penn* v. *Watson*, 13.
2. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, *were held* inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale. *Ib.*
3. In this state, a plaintiff's book of original entries, kept by himself, is not admissible evidence in support of a demand for goods sold and delivered, with or without his suppletory oath. *Hissrick* v. *McPherson*, 310.
4. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis circuit court by the act establishing the land court. *McCune* v. *Hull*, 596.

ACKNOWLEDGMENT.

1. The mere addition of the words, "*and relinqutshes her dower*," in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chauvin* v. *Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.) *Perkins* v. *Carter*, 465.
2. The certificate of acknowledgment to a deed executed in Kentucky in 1829, ran in the name of J. B., clerk of the county court, but was signed at the foot, "J. B., by J. J. A., deputy clerk." *Held* sufficient. *Gibbons* v. *Gentry*, 468.
3. The omission of the officer taking the acknowledgment of a mortgage to certify to the personal identity of the grantor, can only be taken advantage of by a subsequent purchaser for a valuable consideration. *Chouteau* v. *Burlando*, 482.

ACTION ON THE CASE.

1. Where ministerial officers are required to exercise their judgment, they

ACTION ON THE CASE—(*Continued.*)

are not liable for any errors, in the absence of malice. So, a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed* v. *Conway*, 22.

2. In an action on the case, begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully* and *negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all. *Martin's Ex'rs* v. *Miller*, 391.

ACTS OF ASSEMBLY.

See STATUTES.

ADMINISTRATION.

1. The provision in the administration law of 1845, that an administrator shall not be an incompetent witness for the estate, as to facts which occurred before his qualification, does not apply when he is at the same time a distributee. *Penn* v. *Watson*, 13.
2. Under the new practice act, the distributee of a solvent estate is not a competent witness for the estate. *Ib.*
3. The distributee of a solvent estate is a competent witness for the estate, under the new practice. (*Penn* v. *Watson*, overruled.) *Stein* v. *Weidman*, 17.
4. A widow is a competent witness for or against her deceased husband's estate, whether solvent or insolvent, as to all such facts as the policy of the law does not require to be kept sacred and secret between husband and wife during marriage. *Ib.*
5. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted. *Ib.*
6. The allowances made to administrators in their annual and final settlements have the effect of judgments, and are conclusive between the parties at law; but may be set aside in equity upon a proper showing. *Jones* v. *Brinker*, 87.
7. A statement that the administrator *illegally* procured allowances in his favor does not make out a case for equitable relief. *Ib.*
8. The statute of limitations runs in favor of an administrator against the distributee of an estate from the date of the final settlement and order of distribution. *The State* v. *Blackwell*, 97.
9. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a

ADMINISTRATION—(*Continued.*)

single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State* v. *Ruggles*, 99.

10. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors. *Ib.*
11. If an executor pays a legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. *Ib.*
12. In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. *Ib.*
13. But if the executor had at first enough to pay all the legacies, and by his subsequent wasting of the assets they became deficient, in that case, such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence. *Ib.*
14. A legatee suing on an administration bond for a legacy must show the same facts that he would be compelled to show had he sued the administrator by bill in equity. *Ib.*
15. The same principle applies to an administrator who voluntarily pays illegal taxes upon the estate of his intestate, as to a person acting for himself. Neither can maintain an action to recover back. *Christy* v. *City of St. Louis*, 143.
16. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law, (R. C. 1845.) *Asbury* v. *McIntosh*, 278.
17. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. *Harness* v. *Green's Adm'r*, 316.
18. Under our administration law classifying demands, (R. C. 1845, sec. 1, art. 4,) only judgments of our own state can be placed in the fourth class. Judgments of sister states have no preference over simple contract debts. *Ib.*
19. As by our statute, the letters of an administrator are revoked by the fact of his becoming a non-resident, he cannot afterwards be made a party to a suit in his administrative capacity. *Chouteau* v. *Burlando*, 482.
20. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations. *Keeton* v. *Keeton*, 530.

ADMINISTRATION—(*Continued.*)

21. Facts stated, which, in the opinion of the court, showed fraud in a sale by an administrator of slaves belonging to the estate of his intestate. *Ib.*
22. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title. *Wolf* v. *Robinson*, 459.
23. The title of the purchaser at an administration sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding. *Ib.*

ADULTERY.

See INDICTMENT, 5.

AFFIDAVIT.

1. The supreme court will not reverse a case because the plaintiff did not swear anew to his petition after an amendment in the caption. *Matthews* v. *Rountree*, 282.

AGREEMENT.

See GUARANTY. As to recoupment of damages upon a contract of sale, see DAMAGES, 5. SPECIFIC PERFORMANCE. SALE.

1. A. owning a share of the outfit of a California gold company, executed to B. a writing, by which he sold "one half of his interest in the company." A subsequent clause provided that B. should not be a partner in the company, but only "purchaser of one half A.'s interest in the metals and ores" that might be obtained. *Held*, A.'s interest in the *outfit* did not pass. *Phillips* v. *Jones' Adm'r*, 67.
2. It is optional with a party who has made a parol contract to convey land to avail himself of the plea of the statute of frauds or not. (*McGowen* v. *West*, 7 Mo. Rep. 570, affirmed.) *Farrar* v. *Patton*, 81.
3. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds, the terms of the contract plainly appearing. *Ib.*
4. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought be enforced. *Ib.*
5. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land. *Parke* v. *Leewright*, 85.
6. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be. *Ib.*
7. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of

AGREEMENT—(*Continued.*)

title, the expenses of medical attendance which the latter might have to pay to a physician will be supported. *Livingston* v. *Dugan*, 102.

8. The compromise of a doubtful right is a good consideration for a promise. *Ib.*
9. A contract to convey to A. a quarter section of land, *to be selected by him*, cannot be assigned to B. so as to entitle him to make a selection. *McQueen* v. *Chouteau's Heirs*, 222.
10. A promise in writing to pay a specified sum to trustees *to be appointed* by a certain convention, is a valid note, within the meaning of the first section of the act concerning "bonds and notes," (R. C. 1845,) and imports a consideration. *Caples* v. *Branham*, 244.
11. Under our act, (R. C. 1845,) a party may proceed against a boat by name for the non-performance of a contract made by her master, upon a trip up the river, for the transportation of freight upon the return trip. *Taylor* v. *Steamboat Robt. Campbell*, 254.
12. One partner may sue for the breach of a contract made by him in his own name, although it was made for the benefit of the firm. *Ib.*
13. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might *go to the jury*, upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent. *Ib.*
14. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation. *Ib.*
15. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to *St. Louis*. *Ib.*
16. *Collier* v. *Swinney*, 16 Mo. Rep. 484, affirmed.
17. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor. *Cahill* v. *Ragan*, 451.
18. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds. *Houghtaling* v. *Ball & Chapin*, 563.

AMENDMENT.

See PLEADING, 1.

1. The insertion of an "&" between the christian and sir-name of a plaintiff in the caption of a petition, may be summarily amended. *Hite* v. *Hunton*, 286.
2. The supreme court will not revise the discretion exercised by inferior courts in allowing amendments, unless it clearly appears that the dis-

AMENDMENT—(*Continued.*)

cretion has been abused to the prejudice of the party. *Cullum* v. *Cundiff*, 522.

APPEAL.

See WRIT OF ERROR.

1. After an appeal has once been granted, the power of the inferior court over the subject is exhausted. If the appeal is dismissed, or if from any cause, the party loses the benefit of it, he cannot take another appeal, but must resort to his writ of error. *Brill* v. *Meek*, 359.
2. In a partition suit, judgment that partition be made is an interlocutory judgment from which no appeal lies. *McMurtry* v. *Glascock*, 432.
3. No appeal or writ of error lies from a voluntary non-suit taken upon the refusal of the inferior court to strike out an answer as insufficient. *Louisiana & Middletown Plank Road Co.* v. *Mitchell*, 432.
4. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law, (R. C. 1845.) *Asbury* v. *McIntosh*, 278.

ASSIGNMENT.

See PROMISSORY NOTES, 1. As to assignment of Stock, see CORPORATIONS, 3. BONDS AND NOTES, 13, 14.

1. A contract to convey to A. a quarter section of land, *to be selected by him*, cannot be assigned to B. so as to entitle him to make a selection. *McQueen* v. *Chouteau*, 222.
2. In an action by the general assignees of an insolvent, to recover a debt due the assignor, the defendant was allowed to set up as an equitable defence or set-off the amount of a note paid by him after the assignment, as security of the assignor upon a note which was under protest at the date of the assignment. *Morrow's Assignees* v. *Bright*, 298.
3. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party. *Powers* v. *Heath's Adm'r*, 319.
4. A particular assignment for value by husband and wife of the wife's reversionary interest in a chattel, expectant on the death of a tenant for life, does not defeat the wife's right of survivorship, where the husband dies before the death of the tenant for life. The assignment, in such a case, does not operate as a constructive reduction into possession by the husband. *Wood* v. *Simmons*, 363.
5. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name. *Vandoren* v. *Relfe*, 455.
6. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it. *Gale* v. *Mensing*, 461.

ASSIGNMENT—(*Continued.*)

7. Neither an original general assignee nor one substituted by the appointment of the court, under the statute, (R. C. 1845,) in possession of chattels claimed under the assignment, will be protected from suit by a party claiming the same chattels under a conveyance from the assignor previous to the assignment, on the ground of being an officer or *quasi* officer of court. *Page & Bacon* v. *Gardner*, 507.
8. A general conveyance of all debts that "may be due" to the grantor, at a specified subsequent date, without a schedule, passes to the grantee such a title as will enable him to recover from a subsequent general assignee of the grantor at least all accounts (or the money collected upon them) *contracted*, though not *due* at the date of the conveyance. *Ib.*
9. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of any funds of the drawer in the hands of the drawee, so as to defeat attaching creditors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill. *Kimball* v. *Donald*, 577. *Engler* v. *Rice*, 583.
10. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning "bonds and notes," (R. C. 1845.) *Smith* v. *Ashby*, 354.

ASSUMPSIT.

1. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of title, the expenses of medical attendance which the latter might have to pay to a physician will be supported. *Livingston* v. *Dugan*, 102.
2. The compromise of a doubtful right is a good consideration for a promise. *Ib.*
3. A party cannot maintain an action to recover back illegal taxes paid by him without objection. The same principle applies to an administrator who pays illegal taxes upon the estate of his intestate. Nor can an administrator recover back illegal taxes voluntarily paid by a former administrator. *Christy's Adm'r* v. *City of St. Louis*, 143.
4. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor. *Cahill* v. *Ragan*, 451.
5. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield* v. *Branson*, 301.
6. Where a plaintiff, in a suit for wages, proves services, but fails to prove their value, an instruction that he cannot recover is erroneous, as he is entitled to a nominal sum at least. *Owen* v. *O'Reilly*, 603.

ATTACHMENT.

1. Suit by attachment on a note given by B. F. O. & Co., was commenced before a justice against B. F. O. & ——— O. The affidavit alleged that B. F. O. & ——— O. (composing the firm of B. F. O. & Co.,) were non-residents. The firm of B. F. O. & Co. was really composed of B. F. O. & R. S. Upon appeal to the circuit court, the suit was dismissed as to ——— O. Before or after this dismissal, (it did not appear which,) a plea in abatement was filed, denying the non-residence of B. F. O. & ——— O. *Held*, the only issue to be tried upon the plea was, whether B. F. O. was a non-resident. *Moore* v. *Otis*, 153.
2. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of any funds of the drawer in the hands of the drawee, so as to defeat attaching creditors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill. *Kimball* v. *Donald*, 577. *Engler* v. *Rice*, 583.

AUTHENTICATION.

See WILL, 3.

BAILMENT.

See CARRIER. BOATS AND VESSELS.

BILL OF EXCEPTIONS.

1. Judgment affirmed for want of bill of exceptions, the cause having originated before a justice, and nothing appearing in the record to warrant a disturbance of the judgment. *Elliott* v. *Pogue*, 263.
2. Bill of exceptions stricken out, because not filed at the term at which the trial took place, no reason for the delay appearing on the record. *Ruble* v. *Thomasson*, 263.

BILL OF REVIEW.

See PRACTICE IN CHANCERY.

BILLS OF EXCHANGE AND NEGOTIABLE NOTES.

1. A party who puts his name upon the back of a negotiable note, to which, at the time, he is not a party, is *prima facie* liable as maker; and although, as between parties entitled to look into the real transaction, it may be shown that he signed as endorser, this cannot be shown against a party who took the note in the usual course of business, before it was due, without notice and for value. *Schneider* v. *Schiffman*, 571.
2. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (SCOTT, J., dissenting.) *Wheeler* v. *Barret*, 573.
3. A bill of exchange drawn by a merchant upon his factor cannot, before acceptance, take effect as an equitable assignment of any funds of the drawer in the hands of the drawee, so as to defeat attaching credi-

BILLS OF EXCHANGE AND NEGOTIABLE NOTES—(*Continued.*)

tors, although there may be a direction at the foot of the bill to charge to a particular account, and although the drawee may have promised to apply any balance in his hands belonging to the drawer, in payment of the bill. *Kimball* v. *Donald* 577. *Engler* v. *Rice*, 583.

4. Possession by the endorser of a dishonored bill of exchange is evidence sufficient to enable him to maintain an action thereon, though at the same time there appears upon the bill an endorsement in full from him to another party. *Page & Bacon* v. *Lathrop*, 589.
5. Although a bill purports to have been drawn by an agent under a special written authority, other evidence is admissible to establish his authority, so as to relieve him from personal liability on the bill, as a person acting without authority. (SCOTT, J., dissenting.) *Ib.*
6. Can a payee, who receives a bill, drawn by an agent in the name of his principal under a written authority shown to him at the time, afterwards charge the agent as principal, as having drawn without authority? *Ib.*

BOATS AND VESSELS.

1. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert* v. *Rider & Allen*, 146.
2. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass. *Ib.*
3. Under our act, (R. C. 1845,) a party may proceed against a boat by name, for the non-performance of a contract made by her master, upon a trip up the river, for the transportation of freight upon the return trip. *Taylor* v. *Steamboat Robt. Campbell*, 254.
4. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might *go to the jury* upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent. *Ib.*
5. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation. *Ib.*
6. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to St. Louis. *Ib.*
7. *Collier* v. *Swinney*, (16 Mo. Rep. 484,) affirmed.

BOATS AND VESSELS—(*Continued.*)

8. Upon the question of negligence of a boat, evidence of the statements of the pilot is not admissible. *Brady* v. *Steamboat Highland Mary*, 264.
9. It is not *prima facie* within the scope of the employment of a steamboat or the authority of her officers, to carry specie for hire; and in order to hold the boat or her owners liable for the loss of money entrusted to the clerk by a passenger, a known and established *usage* for steamboats to carry money for hire on account of the owners, must be shown. (*Chouteau & Valle* v. *Steamboat St. Anthony*, 16 Mo. Rep., affirmed.) *Whitmore* v. *Steamboat Caroline*, 513.
10. The implied undertaking of a common carrier to carry the baggage of passengers, does not include more money than a reasonable amount to pay traveling expenses. *Ib.*
11. Evidence of a custom by boats to carry bank bills for customers to conciliate their patronage, is insufficient to establish a custom of carrying bank bills for hire. *Chouteau & Valle* v. *Steamboat St. Anthony*, 519.
12. The principle that a bailee, who gratuitously undertakes to do an act, is liable for negligence in doing it, is not applicable to steamboats. *Ib.*

BONDS AND NOTES.

See PROMISSORY NOTES.

1. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State* v. *Ruggles*, 99.
2. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors. *Ib.*
3. A legatee suing on an administration bond, for a legacy, must show the same facts that he would be compelled to show, had he sued the administrator by bill in equity. *Ib.*
4. A promise in writing to pay a specified sum to trustees *to be appointed* by a certain convention, is a valid note within the meaning of the first section of the act concerning bonds and notes, (R. C. 1845,) and imports a consideration. *Caples* v. *Branham*, 244.
5. It is not necessary that the payees should be designated when the promise is made, if they are designated before suit brought. *Ib.*
6. In declaring upon such an instrument, it is not necessary to set out a consideration in the declaration. *Ib.*
7. One instalment of a note due by instalments may be recovered before the others are due; and under the new practice, it would probably not be material whether the amount is sought to be recovered as a debt or damages. *Ib.*
8. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable *in an action upon the note*, upon proof of his want of authority. *Byars* v. *Doores*, 284.

BONDS AND NOTES—(*Continued.*)

9. Action on a non-negotiable note by the assignee against the maker. Answer—that the maker being security for the payee, the latter deposited with him a chattel as a pledge for his indemnity, and thereupon, the note was given, merely as evidence of the deposit. *Held*, a good plea of want of consideration. *Doan* v. *Moss*, 297.
10. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state. *State* v. *Mutr & Ritter*, 303.
11. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law. *Ib.*
12. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party. *Powers* v. *Heath's Adm'r*, 319.
13. The failure of the assignee of a note not negotiable under the statute to bring suit against the maker to the first term of the court, or first law day of the justice having jurisdiction, without excuse, discharges the assignor. *Stone* v. *Corbett*, 350.
14. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Ib.*
15. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning bonds and notes, (R. C. 1845.) *Smtth* v. *Ashby*, 354.
16. In an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment damages for the removal and conversion of *fixtures*, without his knowledge or consent, after the contract of sale and before a formal transfer of the land, and the execution of the bonds. *Grand Lodge of Masons* v. *Knox*, 433.
17. It is a good defence to a note given for the price of land conveyed by deed containing a covenant of warranty, that the grantor had no title. *Hobein* v. *Drewell*, 450.

BOOKS OF ACCOUNT.

1. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, *were held* inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale. *Penn* v. *Watson*, 13.
2. A plaintiff's book of original entries, kept by himself, not evidence. *Hissrick* v. *McPherson*, 310.

CARONDELET.

1. The title of Carondelet to common, under the act of June 13, 1812, may be established without a survey, by proof of *user* prior to December 20, 1803. *City of Carondelet* v. *McPherson*, 192.
2. As to the power in the general land office to set aside an approved survey made prior to July 4, 1836, and within what time it must be exercised, if it exists. *Ib.*
3. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey. *Ib.*

CARRIER.

See BOATS AND VESSELS.

CHARITY.

1. A court will not interfere to establish the validity of a charity in a will, depending upon a contingency which has not arisen and may never arise. *The State* v. *Prewett*, 165.

CHOUTEAU SPRING COMPANY.

See CORPORATIONS, 3.

CIRCUIT ATTORNEY.

1. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends. *State* v. *Rich*, 393.

COMMITMENT.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpœna duces tecum*. *Ex parte Mallinkrodt*, 493.

COMMON.

See CARONDELET.

COMMUNITY.

1. Neither by the Spanish law nor by the custom of Paris did a royal grant or gift to either of two spouses enter into the community. *Wilkinson* v. *The American Iron Mountain Co.*, 122.
2. The same rule applied to concessions in Louisiana, unless when made upon a consideration which was a burden on the community. *Ib.*
3. A marriage contract, entered into at Ste. Genevieve in 1797, contained this clause: "The intended consorts shall be in community as to all property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, &c. *Held*, the words "according to and in conformity with the custom of this place" referred to the *community*, and not to the acquisition of property, and the clause did not have the effect to bring into the community property which would otherwise not be embraced by it. *Ib.*

COMMUNITY—(*Continued.*)

4. The operation of a clause in a marriage contract, *establishing* a community cannot be enlarged by a subsequent clause providing for a *renunciation* of it. *Ib.*

CONFIRMATION.

See LANDS AND LAND TITLES, 10.

CONSIDERATION.

See PROMISSORY NOTES, 3.

1. A promise by the owner of a slave to pay to a party having him in possession, in good faith for a valuable consideration, under a claim of title, the expenses of medical attendance which the latter might have to pay to a physician will be supported. *Livingston* v. *Dugan*, 102.
2. The compromise of a doubtful right is a good consideration for a promise. *Ib.*
3. A promise in writing to pay a specified sum to trustees *to be appointed* by a certain convention, is a valid note, within the meaning of the first section of the act concerning bonds and notes, (R. C. 1845,) and imports a consideration. *Caples* v. *Branham*, 244.
4. It is not necessary that the payees should be designated when the promise is made, if they are designated before suit brought. *Ib.*
5. In declaring upon such an instrument, it is not necessary to set out a consideration in the declaration. *Ib.*
6. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield* v. *Branson*, 301.
7. Smallness of consideration in a sheriff's deed, of itself, under the circumstances of the case, *held* not sufficient to affect a purchaser from the sheriff's vendee with notice of fraud in the title of his vendor. *Chouteau* v. *Nuckolls*, 442.
8. It is a good defence to a note given for the purchase money of land conveyed by a deed containing a covenant of general warranty, that the grantor had no title. *Hobein* v. *Drewell*, 450.

CONSTABLE.

1. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state. *State* v. *Muir & Ritter*, 303.
2. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law. *Ib.*

CONSTITUTION.

1. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State* v. *Ambs*, 214.
2. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*

CONSTITUTION—(*Continued.*)

3. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional. *Hull* v. *Dowdall*, 359.
4. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends. *State* v. *Rich*, 393.
5. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *Ib.*
6. The law prohibiting the sale of liquor (R. C. 1845,) without a license is constitutional. *State* v. *Searcy*, 489.
7. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. *Harness* v. *Green's Adm'r*, 316.

CONTEMPT.

See NOTARY PUBLIC.

CONTRACT.

See AGREEMENT. SALE. As to recoupment of damages on a contract of sale, see DAMAGES, 5.

CONVEYANCE.

See SHERIFF'S DEED. EMBLEMENTS. USES AND TRUSTS, 7. ACKNOWLEDGMENT.

1. A conveyance of all the grantor's "right, title and interest" in a tract of land to which he had the legal title, but which he had previously made a parol contract to convey to his father, since deceased, *was held* to pass only his interest as *heir* of his father. *Farrar* v. *Patton*, 81.
2. An unrecorded deed is good against a judgment, if recorded before an execution sale under the judgment. (*Davis* v. *Ownsby*, 14 Mo. Rep. 170, affirmed. SCOTT, J., dissenting.) *Valentine* v. *Havener*, 133.
3. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider* v. *Stathr*, 269.
4. Where a minor *feme covert* joins in a mortgage of her real estate, she may plead infancy *during minority* in a suit to foreclose. *Ib.*
5. A conveyance by a trustee passes the *legal title*, although he may be guilty of a breach of trust. *Gale* v. *Mensing*, 461.
6. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it. *Ib.*
7. The mere addition of the words, "*and relinquishes her dower,*" in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chauvin* v. *Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.) *Perkins* v. *Carter*, 465.
8. A general conveyance of all debts that "may be due" to the grantor, at a specified subsequent date, without a schedule, passes to the grantee

CONVEYANCE—(*Continued.*)

such a title as will enable him to recover from a subsequent general assignee of the grantor at least all accounts (or the money collected upon them) *contracted*, though not *due* at the date of the conveyance. *Page & Bacon* v. *Gardner*, 507.

9. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, *verbally* sold to the grantee; this being an *interest in land* within the statute of frauds. *McIlvaine* v. *Harris*, 457.

CORPORATIONS.

1. The president is the proper party upon whom to serve process against a corporation, and may appear and confess a judgment for the corporation. *Chamberlin* v. *The Mammoth Mining Co.*, 96.
2. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back on the ground that the city has no capacity to take money which it has no right by charter to demand. *Christy's Adm'r* v. *City of St. Louis*, 143.
3. The charter of an incorporated company provided that the stock might be "transferred on the books of the company." The company was authorized "to regulate the transfer of stock" by by-laws. A provision in the charter authorized the company, in certain cases, to make assessments on "*stockholders*," beyond their shares of stock. *Held*: That no such assessment could be made on a party after he had ceased to be a member, by a transfer of his stock; that the power "to regulate the transfer" did not include the power to *restrain* transfers, or prescribe to whom they might be made, but merely to prescribe the formalities to be observed in making them; and that the company could not prevent a party from selling his stock even to an insolvent person; that an assignment "upon the books of the company" was sufficient to effect a change of ownership, without taking out a new certificate in the name of the assignee; and that any transfer in writing was valid against the company, if, being notified, they refused to allow it to be made according to their by-laws. *Chouteau Spring Co.* v. *Harris*. 382.

COUNTIES.

1. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *State* v. *Rich*, 393.

COURTS.

See JURISDICTION.

COVENANT.

1. The assignee of a claim for damages upon a broken covenant of seizin must, under the new practice, sue in his own name. *Vandoren* v. *Relfe*, 455.

CRIMES AND PUNISHMENTS.

See INDICTMENT.

1. A party taking property under the direction of another, to whom he believed it to belong, is not guilty of larceny. *State* v. *Matthews*, 55.
2. Altering the mark of an animal is not larceny under the statute, unless done with the intention to steal or convert. *Ib.*
3. An indictment of a married man for lewdly and lasciviously abiding and cohabiting with a female, under the second clause of section 8 of article 8 of the act concerning "Crimes and Punishments," (R. C. 1845,) must state that the parties lewdly and lasciviously abided and cohabited *with each other*, in the words of the statute. *State* v. *Byron*, 211.
4. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State* v. *Ambs*, 214.
5. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*
6. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines. *Ib.*
7. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages. *Fackler* v. *Chapman*, 249.
8. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another. *Ib.*
9. Possession of stolen goods recently after the larceny is a circumstance of guilt, the weight of which is for the determination of the jury under all the circumstances. *Ib.*
10. An indictment against a man and woman, which charges that they were "guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other," &c., in the words of the third specification of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) is good, although it does not state whether they were married or unmarried. *State* v. *Bess*, 419. *State* v. *Wilhight*, 422.
11. Under our statute, an indictment for murder in the first degree must set forth with accuracy the manner in which the murder was committed; if by poison or by lying in wait, it must be so stated, and if by any other kind of wilful, deliberate and premeditated killing, the circumstances must be set forth intelligibly. *State* v. *Jones*, 58.
12. An indictment for murder, which charges that the defendant "did strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased then and

CRIMES AND PUNISHMENTS—(*Continued.*)

there, in and upon the left side of the belly and also in and upon the right shoulder, *one* mortal wound," &c., is bad. *Ib.*

13. The part of the body where the wound was inflicted must be set forth with certainty. *Ib.*
14. Provocation is a question of law. (*State* v. *Dunn*, 18 Mo. Rep., affirmed.) *Ib.*
15. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute. *State* v. *Upton*, 397.

CUSTOM OF PARIS.

See COMMUNITY.

DAMAGES.

See BONDS AND NOTES, 1, 2. TRESPASS, 4. ADMINISTRATION, 9, 10.

1. Under the charter of the Hannibal and St. Joseph railroad company, (Sess. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal & St. Joseph Railroad Co.* v. *Morton*, 70.
2. Where a party files a bill in equity for the specific performance of a contract for the conveyance of land, knowing at the time that it is not in the power of the defendant specifically to perform the contract, the court will not, in ordinary cases, decree to him compensation in damages, but will leave him to his remedy at law for a breach of the contract. *McQueen* v. *Chouteau's Heirs*, 222.
3. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages. *Fackler* v. *Chapman*, 249.
4. The supreme court will not reverse a judgment for excessive damages unless in a very clear case. *Woodson* v. *Scott*, 272.
5. In an action upon bonds given for the purchase money of land, the defendant may set up by way of recoupment damages for the removal and conversion of *fixtures*, without his knowledge or consent, after the contract of sale and before a formal transfer of the land and the execution of the bonds. *Grand Lodge of Masons* v. *Knox*, 433.
6. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name. *Vandoren* v. *Relfe*, 455.
7. A case where the supreme court refused to reverse a judgment for excessive damages. *Barth* v. *Merritt*, 567.
8. Where a plaintiff, in a suit for wages, proves services, but fails to prove their value, an instruction that he cannot recover is erroneous, as he is entitled to a nominal sum at least. *Owen* v. *O'Reilly*, 603.

DECREE.

See DIVORCE.

1. In this state, a decree against infants, for the sale of real estate held by their ancestor and another as partnership property, for the payment of the partnership debts, is not erroneous because no day is given them after coming of age to show cause against it. SCOTT, J., dissenting. *Creath* v. *Smith & Atkins*, 113.
2. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title. *Wolf* v. *Robinson*, 459.

DEED.

See CONVEYANCE.

DEED OF TRUST.

See MORTGAGES, 16.

DEPOSITIONS.

See NOTARY PUBLIC.

DESCRIPTION.

See WILL, 2.

DIVORCE.

1. The provision in the act regulating practice in chancery, (R. C. 1845,) that a decree rendered against a party who has not been summoned and has not appeared, may be set aside within a time limited, applies to a decree for a divorce. SCOTT, J., dissenting. *Smith* v. *Smith*, 166.
2. Bill for a divorce. It appeared from the record that, after a decree *nisi*, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed. *Oliver* v. *Oliver*, 261.
3. Upon a sentence of divorce, a wife becomes entitled to all *choses in action* not previously reduced into possession by the husband, as by survivorship upon the death of the husband. *Wood* v. *Simmons*, 363.

DOWER.

1. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt. *Duhring* v. *Duhring*, 174.

EJECTMENT

1. Where a defendant in ejectment relies in his answer upon a legal title, he cannot at the trial avail himself of a merely equitable defence. *Kennedy* v. *Daniels*, 104.
2. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry. *Carman* v. *Johnson*, 108.
3. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity. *Ib.*
4. Under the new practice, a party who relies upon facts which would

EJECTMENT—(*Continued.*)

constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would formerly have been necessary in a bill in chancery. *Ib.*

5. The mere statement in an answer that the defendant's entry was prior to the entry upon which the plaintiff's patent issued, is no ground of equitable relief. *Ib.*
6. The only effect of a failure by a mortgagee to make a subsequent incumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure. *Valentine* v. *Havener*, 36.
7. Under execution upon a judgment of a state court, real estate was sold to A., being at the time subject to the lien of a judgment of the United States circuit court. After the lien of the latter judgment expired, execution upon it issued, under which the same real estate was sold to B. *Held*, A. had the better title. *Chouteau* v. *Nuckolls*, 442.

EMBLEMENTS.

1. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, *verbally* sold to the grantee; this being an *interest in land* within the statute of frauds. *McIlvaine* v. *Harris*, 457.

ESTOPPEL.

1. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey. *City of Carondelet* v. *McPherson*, 192.

EVIDENCE.

See JURORS, 1, 2. AGREEMENT, 17.

1. A plaintiff's books of account kept by a clerk, then absent in a sister state, accompanied by plaintiff's suppletory oath, *were held* inadmissible evidence in his favor, it not appearing that the entries were made at or near the time of sale. *Penn* v. *Watson*, 13.
2. The provision in the administration law of 1845, that an administrator shall not be an incompetent witness for the estate, as to facts which occurred before his qualification, does not apply when he is at the same time a distributee. *Ib.*
3. Under the new practice act, the distributee of a solvent estate is not a competent witness for the estate. *Ib.*
4. The distributee of a solvent estate is a competent witness for the estate, under the new practice. (*Penn* v. *Watson*, overruled.) *Stein* v. *Weidman*, 17.
5. A widow is a competent witness for or against her deceased husband's estate, whether solvent or insolvent, as to all such facts as the policy

EVIDENCE—(*Continued.*)

of the law does not require to be kept sacred and secret between husband and wife during marriage. *Ib.*

6. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted. *Ib.*

7. The fact that the claimant of a lot applied for and obtained in 1808, the benefit of an act for the relief of insolvent debtors, and did not include the lot in his inventory, which was required to be sworn to as a full and perfect discovery of all his real and personal estate, together with the fact that he had previously removed the machinery of a mill which he had erected upon it, and the occupation of which had been his only possession or evidence of title, is evidence to go to a jury of an abandonment. *Barada* v. *Blumenthal*, 162.

8. A will described land devised as the "south-east and south-west quarters of section 4, in township 60, range 38, in Holt county, Missouri." The devisee of the south-west quarter was to have access to the "Big Spring." *Held*, parol evidence that the corresponding quarter sections of township *fifty-nine*, in the same range and county, were intended to be devised, was admissible, it appearing that the "Big Spring" was upon the south-east quarter of section 4, in township fifty-nine, and that the testator never owned or claimed any land in section 4 of township 60. *Riggs* v. *Myers*, 239.

9. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another. *Fackler* v. *Chapman*, 249.

10. Possession of stolen goods recently after the larceny is a circumstance of guilt, the weight of which is for the determination of the jury under all the circumstances. *Ib.*

11. A. sued a boat for the non-performance of a contract made by her master by telegraph. It was proved that A. sent a dispatch to the boat, which was delivered to her officers. *Held*, a dispatch purporting to come from the master in reply might *go to the jury* upon proof that it was delivered in the telegraph office, without express proof that it was sent by the master, or with his consent. *Taylor* v. *Steamboat Robt. Campbell*, 254.

12. It is no defence for a party, who is sued for the breach of a contract to transport a specific number of articles, with which he did not offer to comply, that the plaintiff did not have as large a number as was specified ready for transportation. *Ib.*

13. A telegraphic dispatch from a boat on the Missouri river agreeing to transport freight, without naming the point of destination, may go to the jury as evidence of a contract to transport to St. Louis. *Ib.*

EVIDENCE—(*Continued.*)

14. Upon the question of negligence of a boat, evidence of the statements of the pilot is not admissible. *Ready* v. *Steamboat Highland Mary*, 264.
15. In this state, a plaintiff's book of original entries, kept by himself, is not admissible evidence in support of a demand for goods sold and delivered, with or without his suppletory oath. *Hissrick* v. *McPherson*, 310.
16. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler* v. *Servoss*, 6 Mo. Rep. 24, affirmed. *Dowd* v. *Winters*, 361.
17. Jurors are the exclusive judges of the weight of evidence. *State* v. *Upton*, 397.
18. A party objecting to the admission of a record in evidence must specify his objections. *State* v. *Gates*, 400.
19. One witness swearing that he saw two men on horseback meet in a road, and that they wheeled as they passed and had an angry conversation, and another witness, who also saw them meet, swearing that he did not see them wheel, an instruction to the jury that affirmative must prevail over negative testimony was held inapplicable and erroneous. *Ib.*
20. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and *afterwards*, before harvest, *verbally* sold to the grantee; this being an *interest in land* within the statute of frauds. *McIlvaine* v. *Harris*, 457.
21. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle* v. *Nichols*, 326.
22. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State* v. *Baker*, 338.

EXECUTION.

See PRACTICE, 3. CONSTABLE, 1, 2.

1. A man may be the "head of a family," within the meaning of the execution exemption act, though he has neither wife nor children. *Wade* v. *Jones*, 75.
2. As to the regularity of an execution, see *Chamberlin* v. *The Mammoth Mining Co.*, 96.
3. The act of March 5, 1849, exempting certain property of wives from

EXECUTION—(*Continued.*)

the debts of their husbands, only applies where the debts are contracted *after the passage of the act* and before the wife comes into possession of the property. *Cunningham* v. *Gray*, 170. *Tally* v. *Thompson*, 277.

4. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider* v. *Stathr*, 269.
5. The husband's estate during the marriage in his wife's realty, or his tenancy by the curtesy, may however, it would seem, be subjected to sale for his debts. *Ib.*
6. It is no ground for enjoining a sale under execution that the plaintiff was dead when the execution issued. *Tally* v. *Thompson*, 277.
7. The notice of execution required by the act of March 12, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land under a special *fi. fa.* *Hobein* v. *Murphy*, 447. *Hobein* v. *Drewell*, 450.
8. The omission to give the required notice, even in those cases where it is necessary, would not *ipso facto* render the sale void, but the party injured would have relief according to circumstances. If the party whose duty it was to give the notice had acquired the title, the sale might be set aside in a direct proceeding, and the property restored. If a fair purchaser had paid the price and received a conveyance, the remedy would be confined to pecuniary damages against the wrong doer. *Ib.*

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION.

FLOUR, (INSPECTION OF.)

See ST. LOUIS.

FRANCHISE.

1. An injunction does not lie to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable. *James* v. *Dixon*, 79.

FRAUDULENT CONVEYANCE.

See ASSIGNMENT, 6, or CONVEYANCE, 6.

1. G. in Kentucky, in 1829, executed a deed for slaves to trustees, to be held, with their increase, *for the benefit of G. and wife during their lives*, and after their deaths to be divided among their children. *Held*, that the deed was not void upon its own face under the laws of Kentucky in force when it was executed. *Gibbons* v. *Gentry*, 468.
2. Under the first section of the act concerning "fraudulent conveyances," (R. C. 1845,) a deed of a stock of goods to a trustee, for the benefit of creditors, which, on its face, reserves to the grantor the right to continue *to sell the goods in the usual course of his business* until default made in the payment of the debts intended to be secured, is

FRUDULENT CONVEYANCE—(*Continued.*)
as a matter of law, void against existing and subsequent creditors and purchasers. *Brooks* v. *Wimer*, 503.

FRAUDS AND PERJURIES.
See ADMINISTRATION, 10.

1. It is optional with a party who has made a parol contract to conve land to avail himself of the plea of the statute of frauds or not. (*McGowen* v. *West*, 7 Mo. Rep. 570, affirmed.) *Farrar* v. *Patton*, 81.
2. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds, the terms of the contract plainly appearing. *Ib.*
3. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought be enforced. *Ib.*
4. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land. *Parke* v. *Leewright*, 85.
5. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be. *Ib.*
6. Where a deed is executed for land, with a growing crop of wheat upon it, parol evidence is inadmissible to show that the wheat was reserved by the grantor, and afterwards, before harvest, *verbally* sold to the grantee; this being an *interest in land* within the statute of frauds. *McIlvaine* v. *Harris*, 457.
7. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by *fraud*, without stating the facts which constitute the fraud. *Edgell* v. *Sigerson*, 494.
8. A judgment obtained by fraud is void. *Ib.*
9. Facts stated, which, in the opinion of the court, showed fraud in a sale by an administrator of slaves belonging to the estate of his intestate. *Keeton* v. *Keeton*, 530.
10. To avoid a sale of goods on credit, it is not sufficient that the purchaser did not intend to pay for them *at the time agreed upon*. He must, when he buys, intend *never* to pay for them, to prevent the title from passing; and this is a question for a jury. *Bidault* v. *Wales*, 546.
11. To constitute a delivery, within the meaning of the statute of frauds, there must be not only a change of the actual possession, but a change of the civil possession, which is a holding of the thing, with the design of keeping it as owner; and this is a question of fact for a jury. *Cunningham* v. *Ashbrook*, 553.
12. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds. *Houghtaling* v. *Ball & Chapin*, 563.

GRAND JURY.
See JURORS.

GROCERIES AND DRAM-SHOPS.

1. A physician is indictable for selling liquor in less quantity than a quart without a license, unless he sells it in good faith as a medicine upon his professional judgment of its necessity. *State* v. *Larrimore*, 425.
2. The law prohibiting the sale of liquor (R. C. 1845,) without a license is constitutional. *State* v. *Searcy*, 489.
3. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State* v. *Ambs*, 214.
4. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*
5. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines. *Ib.*

GUARANTY.

1. D. sold to B. some lard and agreed in writing as follows: "I am to ship the above lard to Messrs. F. & F., New York, for sale, and to value on them at ninety days from date of delivery of said lard, for full cost of same in favor of said B.; and *above lard to be sold to meet payment of the aforesaid drafts.*" On the same day, C. executed to D. the following writing: "Mr. D. having this day sold to Mr. B. 417 tierces of lard, *upon terms agreed upon by them*, and the said D. having advanced drafts to full amount of cost of said lard, I hereby promise and agree to pay to the said D., or his order, on demand, any amount of reclamation he may have against said B., arising from sales of said lard." The lard was by D. shipped to F. & F., but by an arrangement between them and B., without the knowledge of D., was not sold to meet the drafts, which were by F. & F. otherwise provided for. Afterwards, the lard was sold for less than the amount of the drafts. D. assigned C.'s agreement to F. & F., who bring suit upon it for the reclamation. *Held*, C.'s writing was a guaranty, and to be construed in reference to to the contract between D. & B.; and the guarantor was discharged by the failure to sell the lard within ninety days. (GAMBLE, J., dissenting, holding that C.'s writing was an original undertaking, and could only be discharged by some act of D.) *Fisher & Fellows* v. *Cutter*, 206.

HABEAS CORPUS.

As to *habeas corpus* in case of imprisonment for contempt, see NOTARY PUBLIC.

HANNIBAL AND ST. JOSEPH RAILROAD CO.

See WRIT OF ERROR, 1.

HUSBAND AND WIFE.

See MARRIAGE CONTRACT. COMMUNITY. DIVORCE.

1. A widow is a competent witness for or against her deceased husband's estate, whether solvent or insolvent, as to all such facts as the policy of

HUSBAND AND WIFE—(*Continued.*)

the law does not require to be kept sacred and secret between husband and wife during marriage. *Stein* v. *Weidman* 17.

2. The wife of an administrator is a competent witness for her husband, when sued upon a demand against the estate of his intestate, her former husband, as to facts which came to her knowledge before letters granted. *Ib.*
3. The act of March 5, 1849, exempting certain property of wives from the debts of their husbands, only applies where the debts are contracted *after the passage of the act* and before the wife comes into possession of the property. *Cunningham* v. *Gray*, 170. *Tally* v. *Thompson*, 277.
4. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt. *Duhring* v. *Duhring*, 174.
5. A husband, in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser. *Robinson* v. *Rice*, 229.
6. The act of 1849, exempting certain property of married women from the debts of their husbands, does not prevent the wife from voluntarily joining in a conveyance of her real estate to secure a debt of her husband. *Schneider* v. *Stathr*, 269.
7. The husband's estate during the marriage, or his tenancy by the curtesy, may however, it would seem, be subjected to sale for his wife's debts. *Ib.*
8. Upon a sentence of divorce, a wife becomes entitled to all *choses in action* not previously reduced into possession by the husband, as by survivorship upon the death of the husband. *Wood* v. *Simmons*, 363.
9. A particular assignment for value by husband and wife of the wife's reversionary interest in a chattel, expectant on the death of a tenant for life, does not defeat the wife's right of survivorship, where the husband dies before the death of the tenant for life. The assignment, in such a case, does not operate as a constructive reduction into possession by the husband. *Ib.*
10. The mere addition of the words, "*and relinquishes her dower,*" in the certificate of a married woman's acknowledgment of a conveyance of her own estate will not avoid the deed as to her. (*Chauvin* v. *Wagner*, 18 Mo. Rep. 531, upon this point, affirmed.) *Perkins* v. *Carter*, 465.

INCUMBRANCE.

1. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first. *Helweg* v. *Heitcamp*, 569.

INDICTMENT.

See CRIMES AND PUNISHMENTS.

1. Under our statute, an indictment for murder in the first degree must set forth with accuracy the manner in which the murder was committed; if by poison or by lying in wait, it must be so stated, and if by any other

INDICTMENT—(*Continued.*)

kind of wilful, deliberate and premeditated killing, the circumstances must be set forth intelligibly. *State* v. *Jones*, 58.

2. An indictment for murder, which charges that the defendant "did strike and thrust" the deceased "in and upon the left side of the belly, and also in and upon the right shoulder, giving to the deceased then and there, in and upon the left side of the belly and also in and upon the right shoulder, *one* mortal wound," &c., is bad. *Ib.*
3. The part of the body where the wound was inflicted must be set forth with certainty. *Ib.*
4. Provocation is a question of law. (*State* v. *Dunn*, 18 Mo. Rep. affirmed.) *Ib.*
5. An indictment of a married man for lewdly and lasciviously abiding and cohabiting with a female, under the second clause of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) must state that the parties lewdly and lasciviously abided and cohabited *with each other*, in the words of the statute. *State* v. *Byron*, 210.
6. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State* v. *Baker*, 338.
7. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *State* v. *Rich*, 393.
8. An indictment under the thirtieth section of the act concerning "school lands," (R. C. 1845,) which charges the defendant with committing "waste, trespass *and* other injury," &c., "by cutting down *and* carrying away timber," &c., is not bad for duplicity. *State* v. *Myers*, 409.
9. An indictment upon one section of a statute need not negative an exception in a subsequent section. *State* v. *Shiflett*, 415.
10. An indictment against a man and woman, which charges that they were "guilty of open, gross lewdness and lascivious behavior, by publicly, lewdly and lasciviously abiding and cohabiting with each other," &c., in the words of the third specification of section 8 of article 8 of the act concerning "crimes and punishments," (R. C. 1845,) is good, although it does not state whether they were married or unmarried. *State* v. *Bess*, 419. *State* v. *Wilhight*, 422.
11. An indictment under the 57th section of article one of the act concerning "roads and highways," (R. C. 1845,) must distinctly charge that the fork of the road at which the defendant failed to place a finger board, is within the road district of which he was overseer; and to constitute an offence under this section, the roads forming the fork must not terminate at the same point. *State* v. *Tuley*, 422.
12. "The county aforesaid" in an indictment not a sufficient venue, where two counties have been previously named. *State* v. *McCracken*, 411.

INFANT.

In this state, a decree against infants for the sale of real estate held by their ancestor and another as partnership property, for the payment of the partnership debts, is not erroneous because no day is given to the infants after coming of age to show cause against the decree. (SCOTT, J., dissenting.) *Creath* v. *Smith & Atkins*, 113.

2. An infant cannot execute a power of appointment coupled with an interest. *Thompson & Wife* v. *Lyon*, 155.
3. The disability of infancy cannot be dispensed with by the instrument creating the power. *Ib.*
4. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Ib.*
5. A court of equity, however, will not, in such a case, interfere against a purchaser for a valuable consideration without notice. *Ib.*
6. Where a minor *feme covert* joins in a mortgage of her real estate, she may plead infancy *during minority* in a suit to foreclose. *Schneider* v. *Stahr*, 269.

INJUNCTION.

1. An injunction does not lies to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable. *James* v. *Dixon*, 79.
2. The illegal exemption by city ordinance of the property of one tax payer from assessment for a special sewer tax, will not authorize an injunction to restrain the city from collecting the assessment against another tax payer, not exceeding the amount which the city was authorized to impose; certainly not, unless it appears that, upon payment of the assessment sought to be enjoined, the plaintiff will have paid more than would have been his proportion had it not been for the exemption. *Page* v. *City of St. Louis*, 136.
3. It is no ground for enjoining a sale under execution that the plaintiff was dead when the execution issued. *Tally* v. *Thompson*, 277.

INSOLVENT.

See ASSIGNMENT, 2.

INSPECTION.

See ST. LOUIS.

JUDGMENT.

1. A judgment of conviction in a criminal case cannot be sustained, where the record does not show that the defendant was ever in court until after verdict. *State* v. *Matthews*, 55.
2. The allowances made to administrators in their annual and final settlements have the effect of judgments, and are conclusive between the parties at law; but may be set aside in equity upon a proper showing. *Jones* v. *Brinker*, 87.

JUDGMENT—(*Continued.*)

3. A judgment of foreclosure against a mortgagor who was dead at the commencement of the suit, is void. *Bollinger* v. *Chouteau*, 89.
4. The statutory provision (R. C. 1845) that confessions of judgments before justices of the peace shall be in writing, by its express terms, does not extend to confessions in actions commenced by process. *Chamberlin* v. *The Mammoth Mining Co.*, 96.
5. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State* v. *Ruggles*, 99.
6. An unrecorded deed is good against a judgment, if recorded before an execution sale under the judgment. (*Davis* v. *Ownsby*, 14 Mo. Rep. 170, affirmed. SCOTT, J., dissenting.) *Valentine* v. *Havener*, 133.
7. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert* v. *Rider & Allen*, 146.
8. A judgment was rendered in California against a resident of Missouri upon publication. Afterwards, as shown by the record, the defendant appeared by attorney, filed an affidavit and asked leave to answer, which was granted on condition of payment of costs, but he failed to answer, when the former judgment was reinstated. *Held*, the judgment was conclusive in this state. *Harbin* v. *Chiles*, 314.
9. There is nothing in the constitution and laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states, in allowing demands against the estates of decedents. *Harness* v. *Green's Adm'r*, 316.
10. Under our administration law classifying demands, (R. C. 1845, sec. 1, art. 4,) only judgments of our own state can be placed in the fourth class. Judgments of sister states have no preference over simple contract debts. *Ib.*
11. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional. *Hull* v. *Dowdall*, 359.
12. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled. *Ib.*
13. A judgment rendered in a court of one county, in a cause taken by a second change of venue *by consent of parties* from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau* v. *Nuckolls*, 442.
14. Under the act of congress approved July 4, 1840, the liens of judgments

JUDGMENT—(*Continued.*)

and decrees rendered in the United States circuit and district courts within each state, continue for the same period as the liens of judgments and decrees of the state courts. *Ib.*

15. The pendency of a writ of error in the supreme court of the United States does not affect the duration of the lien of a judgment of the circuit court. *Ib.*
16. Under execution upon a judgment of a state court, real estate was sold to A., being at the time subject to the lien of a judgment of the United States circuit court. After the lien of the latter judgment expired, execution upon it issued, under which the same real estate was sold to B. *Held*, A. had the better title. *Ib.*
17. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by *fraud*, without stating the facts which constitute the fraud. *Edgell* v. *Sigerson*, 494.
18. A judgment obtained by fraud is void. *Ib.*
19. A circuit court has no power to insert a clause in a judgment, authorizing the party against whom it is rendered to move to set it aside at the next term; and where, upon motion made in pursuance of such leave, a judgment was set aside at the next term, and a new judgment rendered, it was treated as a nullity by the supreme court, and the first judgment reinstated. *Hill* v. *City of St. Louis*, 584. *Shepard* v. *City of St. Louis*, 589.
20. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party. *Powers* v. *Heath's Adm'r*, 319.

JUDGMENTS OF SISTER STATES.

See JUDGMENT, 8, 9, 10.

JUDICIAL SALE.

See SALE, 3, 4, 5. ADMINISTRATION, 22, 23.

1. A judgment rendered in a court of one county, in a cause taken by a second change of venue *by consent of parties* from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau* v. *Nuckolls*, 442.
2. The notice of execution required by the act of March 12, 1849, to be given to a judgment debtor, who is a non-resident of the county in which the land to be sold is situated, is not necessary in a sale of mortgaged land under a special *fi. fa.* *Hobein* v. *Murphy*, 447.
3. The omission to give the required notice, even in those cases where it is necessary, would not, *ipso facto* render the sale void, but the party injured would have relief according to circumstances. If the party whose duty it was to give the notice had acquired the title, the sale might be set aside in a direct proceeding, and the property restored. If a fair purchaser had paid the price and received a conveyance, the remedy would be confined to pecuniary damages against the wrong doer. *Ib.*

JURISDICTION.

1. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Stone* v. *Corbett*, 350.
2. Consent of parties cannot confer jurisdiction. *Ib.*
3. Under the first section of the fourth article of the practice act of 1849, the jurisdiction of courts, in suits where land is the subject of litigation, depends exclusively upon the residence or presence of the parties, and not upon the location of the land. That section repeals the second section of the first article of the act concerning practice in chancery, (R. C. 1845.) *Miller* v. *Thurmond*, 477.
4. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis circuit court by the act establishing the land court. *McCune* v. *Hull*, 596.
5. A judgment in a court of one county, in a cause taken by consent from a court of another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau* v. *Nuckolls*, 442.

JURORS.

1. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle* v. *Nickolls*, 326.
2. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State* v. *Baker*, 338.
3. Jurors are the exclusive judges of the weight of evidence. *State* v. *Upton*, 397.
4. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict. *Ib.*

JUSTICES' COURTS.

1. The president is the proper party upon whom to serve process against a corporation, and may appear and confess a judgment for the corporation. *Chamberlin* v. *The Mammoth Mining Co.*, 96.
2. The statutory provision, (R. C. 1845,) that confessions of judgments before justices of the peace shall be in writing, by its express terms, does not extend to confessions in actions commenced by process. *Ib.*

JUSTICES' COURTS—(*Continued.*)

3. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff the recovery being limited to the damages for the mere taking of the timber. *Pearson* v. *Inlow*, 322.
4. The statutory action by the assignee of a note against the assignor, upon failure to obtain payment from the maker, is not, it seems, to be regarded as an action *upon the note* for the purpose of giving jurisdiction to a justice, when the amount sought to be recovered exceeds his jurisdiction in other actions of assumpsit. *Stone* v. *Corbett*, 350.
5. A party sued before a justice filed as an off-set an account exceeding the justice's jurisdiction, but attempted to be brought within it by a credit for the amount of the plaintiff's demand. *Held*, this could not be allowed as a set-off. *Almeida* v. *Sigerson*, 497.
6. In a suit commenced before a justice, an account was filed, the first item of which was "balance from 1851, $97 90." *Held*, the generality of this item was no sufficient ground for dismissing the suit in the appellate court. *Busch* v. *Diepenbrock*, 568.
7. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back, on the ground that the city has no capacity to take money which it has no right by charter to demand. *Christy's Adm'r* v. *City of St. Louis*, 143.

LAND COURT, (ST. LOUIS.)

See SALARY, 4.

1. An action by one tenant in common to compel a co-tenant, who has received more than his share of the rents, to account, is one, jurisdiction of which is not taken away from the St. Louis circuit court by the act establishing the land court. *McCune* v. *Hull*, 596.

LANDLORD AND TENANT.

1. Where a tenant disclaims the title of his landlord, and asserts a title in himself, he cannot, when defeated, receive compensation in a court of equity for improvements. *McQueen* v. *Chouteau's Heirs*, 222.
2. A privilege in a lease to the lessee of doing such *quarrying* on the demised premises as was necessary to carry on his business as a boat builder, *was held* to confer a property in the rock so quarried. (Judge LEONARD dissenting.) *McKee* v. *Brooks & Meegan*, 526.

LANDS AND LAND TITLES.

See MARRIAGE CONTRACT. COMMUNITY. PUBLIC LANDS, 1. PRACTICE, 36. JURISDICTION, 2.

1. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry. *Carman* v. *Johnson*, 108.

LANDS AND LAND TITLES—(*Continued.*)

2. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity. *Ib.*
3. It is settled that no claim was confirmed by the act of June 13, 1812, which had been previously abandoned. *Barada* v. *Blumenthal*, 162.
4. By abandonment of a lot is meant quitting possession, with the intention that it should no longer be the property of the possessor. *Ib.*
5. Where there is evidence of abandonment, an instruction which leaves that question out of view, is properly refused. *Ib.*
6. The fact that the claimant of a lot applied for and obtained in 1808, the benefit of an act for the relief of insolvent debtors, and did not include the lot in his inventory, which was required to be sworn to as a full and perfect discovery of all his real and personal estate, together with the fact that he had previously removed the machinery of a mill which he had erected upon it, and the occupation of which had been his only possession or evidence of title, is evidence to go to a jury of an abandonment. *Barada* v. *Blumenthal*, 162.
7. The title of Carondelet to common, under the act of June 13, 1812, may be established without a survey, by proof of *user* prior to December 20, 1803. *City of Carondelet* v. *McPherson*, 192.
8. As to the power in the general land office to set aside an approved survey made prior to July 4, 1836, and within what time it must be exercised, if it exists. *Ib.*
9. If a town, through the proper authorities, consents to, accepts and acts upon a survey of its common as correct, it will be estopped from afterwards claiming, as common, land outside of the survey, against a party having acquired a title to it upon the faith of the correctness of the survey. *City of Carondelet* v. *McPherson*, 192.
10. A confirmation by the act of congress of March 3, 1807, and a patent is a better legal title than a confirmation by the same act without a patent. *Maguire* v. *Vice*, 429.

LARCENY.

See CRIMES AND PUNISHMENTS, 1, 2, 7, 8, 9. EVIDENCE, 10.

LEGACY.

1. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *The State* v. *Ruggles*, 99.
2. Where one of several legatees sues the administrator upon his bond for waste, his legacy is not, as a matter of course, to be satisfied out of the damages recovered, to the exclusion of the other legatees, or to the exclusion of creditors. *Ib.*
3. If an executor pays a legacy voluntarily, the law presumes that he has sufficient to pay all the legacies, and the other legatees can resort only against him. *Ib.*

LEGACY—(*Continued.*)

4. In case the assets appear to have been originally deficient, if the executor, either voluntarily or by compulsion, pay one of the legatees, the rest shall make him refund in proportion. *Ib.*
5. But if the executor had at first enough to pay all the legacies, and by his subsequent wasting of the assets they became deficient, in that case, such legatee shall not be compelled to refund, but shall retain the benefit of his legal diligence. *Ib.*
6. A legatee suing on an administrator's bond for a legacy must show the same facts that he would be compelled to show had he sued the administrator by bill in equity. *Ib.*

LICENSE.

See GROCERIES AND DRAM-SHOPS.

1. A dram-shop license does not authorize the holder to sell liquor on Sunday. *State* v. *Ambs*, 214.

LIEN.

See JUDGMENT, 14, 15, 16.

1. A *bona fide* unrecorded deed for real estate will prevent the lien of a judgment against the grantor from attaching, if recorded before a sale under the judgment. *Valentine* v. *Havener*, 133.
2. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first. *Helweg* v. *Heitcamp*, 569.

LIMITATIONS.

1. Where there are mutual running accounts, and the last item on the credit side is within the period which would be a bar by the statute of limitations, the whole account is saved from the operation of the statute. *Penn* v. *Watson*, 13.
2. An adverse possession by a mortgagee, under the statute of limitations, to be a defence against a suit brought by the mortgagor to redeem, must at least be an *actual* possession. Payment of taxes on wild land is not sufficient. *Bollinger* v. *Chouteau*, 89.
3. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Ib.*
4. The statute of limitations runs in favor of an administrator against the distributee of an estate from the date of the final settlement and order of distribution. *The State* v. *Blackwell*, 97.
5. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Thompson & Wife* v. *Lyon*, 155.
6. D. bought a claim to a tract of land in 1820, and soon afterwards took possession of it, built a dwelling, lived upon and cultivated it for eight or ten years, and then removed to Illinois. Afterwards, he paid all the taxes upon the land, had tenants on it part of the time, and when not

LIMITATIONS—(*Continued.*)

tenanted, had an agent in the neighborhood to rent it out for him and protect it from trespassers. *Held*, this was such an adverse possession as, after the lapse of twenty years, was protected by the statute of limitations. *Williams* v. *Dongan*, 186.

7. There is no tacking of disabilities under our statute of limitations. *Ib.*
8. The lapse of thirty years held no bar to the foreclosure of a mortgage upon wild and unimproved land, where neither mortgagor nor mortgagee had been in possession, there being evidence that the mortgagor abandoned all claim to the land after executing the mortgage, and that the mortgage debts were unpaid. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations. *Chouteau* v. *Burlando*, 482.
9. A person who goes to California with the intention of returning, leav- his family and property in Missouri, although he may remain there engaged in business for several months, is not within the last clause of the seventh section of the second article of the statute of limitations. The operation of the statute is not suspended during his absence. *Garth* v. *Robards*, 523.
10. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations. *Keeton* v. *Keeton*, 530.
11. If a complainant relies upon a disability as exempting him from the operation of the statute of limitations, he should set it up in his bill. *Ib.*
12. It is settled that a person out of this state, but within the United States, is not within the meaning of the words "beyond seas" in the statute of limitations of 1825. *Ib.*
13. Cumulative disabilities are not allowed. So, where a cause of action accrues in favor of an infant female, the statute begins to run from the time she becomes of age, although she previously marries. But where two disabilities exist when the cause of action accrues, the statute does not begin to run until they are both removed. *Ib.*
14. One party, who is saved from the operation of the statute of limitations by a disability, can obtain no relief upon a bill in equity jointly with other parties who are barred. *Ib.*
15. Where a bill in chancery, to which limitation was set up as a bar, contained no allegation of any exempting disability, but it appeared in evidence that that some of the complainants had been under a disability which prevented a bar, though the others had not, the supreme court reversed a decree dismissing the bill, in order to afford an opportunity to amend, so as to save the rights of those who were not barred. *Ib.*

MARRIAGE CONTRACT.

1. Neither by the Spanish law nor by the custom of Paris did a royal grant or gift to either of two spouses enter into the community. *Wilkinson* v. *The American Iron Mountain Co.*, 122.

MARRIAGE CONTRACT—(*Continued.*)

2. The same rule applied to concessions in Louisiana, unless when made upon a consideration which was a burden on the community. *Ib.*
3. A marriage contract, entered into at Ste. Genevieve in 1797, contained this clause: "The intended consorts shall be in community as to all property and real estate acquired during marriage, according to and in conformity with the custom of this place, according to which their community shall be regulated, &c. *Held*, the words "according to and in conformity with the custom of this place" referred to the *community*, and not to the acquisition of property, and the clause did not have the effect to bring into the community property which would otherwise not be embraced by it. *Ib.*
4. The operation of a clause in a marriage contract, *establishing* a community cannot be enlarged by a subsequent clause providing for a *renunciation* of it. *Ib.*

MORTGAGE AND DEED OF TRUST.

See EXECUTION, 7, 8. USES AND TRUSTS, 7.

1. A judgment of foreclosure against a mortgagor who was dead at the commencement of the suit, is void. *Bollinger* v. *Chouteau*, 89.
2. An adverse possession by a mortgagee, under the statute of limitations, to be a defence against a suit brought by the mortgagor to redeem, must at least be an *actual* possession. Payment of taxes on wild land is not sufficient. *Ib.*
3. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Ib.*
4. A mortgagee in possession, upon a bill by the mortgagor to redeem, will be allowed for all permanent and useful improvements, deducting rents and profits, and for all taxes paid. *Ib.*
5. The only effect of a failure by a mortgagee to make a subsequent incumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure. *Valentine* v. *Havener*, 133.
6. An unrecorded mortgage is good against a judgment, if recorded before a sale under the judgment. *Ib.*
7. Where a minor *feme covert* joins with her husband in a mortgage of her real estate to secure a debt of the husband, she may, even *during her minority*, in a suit to foreclose, avail herself of the plea of infancy. *Schneider* v. *Staihr*, 269.
8. The husband's estate during the marriage may however be subjected to sale, or at all events, if there was personal service, the mortgagee is entitled to a general judgment against him. *Ib.*
9. The act of 1849, exempting property of wives from execution for any security debts of their husbands, does not prevent the wife from joining with her husband in a mortgage of her real estate to secure a debt contracted by her husband as security. *Ib.*

MORTGAGE AND DEED OF TRUST—(*Continued.*)

10. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Ib.*
11. K. executed to R. an absolute deed for land. R. executed to K. a bond to reconvey, upon payment of a certain sum on or before a specified day. Before the day arrived, R. commenced an ejectment suit against K.'s tenant in possession, in which he recovered judgment for the possession and damages. On the day named in the bond, K. made a tender to R. of the proper amount, but it was not accepted. Afterwards, K.'s interest in the land was sold under execution to A. In a proceeding by A. against R. for the legal title, *held*, in taking an account, R. was to be allowed for the cost of all permanent improvements erected on the premises after he came into possession, and was to be charged with the rent received by him and with the amount of damages recovered in the ejectment suit; and it would seem to make no difference that he received the rents and recovered the damages before A. acquired any title. *Anthony* v. *Rogers*, 281.
12. The effect of the satisfaction of a mortgage is to extinguish the incumbrance upon the title, for the benefit of whoever is the owner of it at the time. *Gale* v. *Mensing*, 461.
13. P. gave a note, with R. &. E. as his sureties, to whom he executed a mortgage on real estate for their indemnity. R. & E. subsequently paid the note in equal proportions. E. afterwards purchased P.'s equity of redemption in the real estate under execution. There was an understanding between R. & E. that the purchase was on their joint account, but the deed was made to E. and it did not appear that R. was in a situation to enforce the agreement. In a suit by P. against R. for the statutory penalty for refusing to enter satisfaction of the mortgage, and to compel him to deliver up the note in his possession to be cancelled, *held*, that it could not be maintained. *Phelps* v. *Relfe*, 479.
14. The lapse of thirty years held no bar to the foreclosure of a mortgage upon wild and unimproved land, where neither mortgagor nor mortgagee had been in possession, there being evidence that the mortgagor abandoned all claim to the land after executing the mortgage, and that the mortgage debts were unpaid. A mortgage may be enforced so long as it is available, although the debt secured by it is barred by the statute of limitations. *Chouteau* v. *Burlando*, 482.
15. The omission of the officer taking the acknowledgment of a mortgage to certify to the personal identity of the grantor, can only be taken advantage of by a subsequent purchaser for a valuable consideration. *Ib.*
16. Where there are three successive deeds of trust on real estate, the surplus proceeds of a sale under the second must be applied in payment of the third, and not of the first. *Helweg* v. *Hettcamp*, 569.
17. The only effect of a failure by a mortgagee to make a subsequent in-

MORTGAGE AND DEED OF TRUST—(*Continued.*)

cumbrancer a party to the proceeding to foreclose is to leave his right to redeem still open. It will not defeat an action for the possession by the mortgagee claiming under the foreclosure. *Valentine* v. *Havener*, 133.

MURDER.

See INDICTMENT, 1, 2, 3, 4. VERDICT, 2.

NEW TRIAL.

1. A new trial will not be granted on account of newly discovered evidence which is merely cumulative. *State* v. *Larrimore*, 425.

NONSUIT.

1. A voluntary nonsuit taken upon refusal to strike out answer as insufficient will not be set aside. *Dumey* v. *Schæffler*, 323. *Louisiana and Middletown Plank Road Co.* v. *Mitchell*, 432.

NOTARY PUBLIC.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpœna duces tecum*. *Ex parte Mallinkrodt*, 493.

NOTICE.

See VENDOR AND PURCHASER, 1, 2. EXECUTION, 7, 8.

OFFICERS.

1. Where ministerial officers are required to exercise their judgment, they are not liable for any errors, in the absence of malice. So, a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed* v. *Conway*, 22.
2. In an action against the securities in a constable's bond, for the failure of an acting deputy to pay over money collected under execution during the constable's term of office, it is no defence that the principal had forfeited his office by removal from the state. *State* v. *Mutr & Ritter*, 303.
3. The securities in a constable's bond are liable for the delinquencies of a deputy acting with the consent of their principal, although the deputy's appointment is not filed as required by law. *Ib.*

OFF-SET.

See SET-OFF.

PARTITION.

1. A note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff. *Ranney* v. *Brooks*, 105.
2. Partition sale set aside, where it appeared that the bidders, for the purpose of obtaining the property at a sacrifice, agreed that one should

PARTITION—(*Continued.*)

become the purchaser, and the others refrain from bidding, in consideration of sharing the benefits of the purchase. *Morton* v. *Hinkle*, 290.

3. A court cannot refuse to entertain a motion to set aside a partition sale because all interested do not join in the motion. *Neal* v. *Stone*, 294.
4. A partition sale will be set aside, where the evidence shows any collusion or contrivance to enable the purchaser to obtain the land below its real value. *Ib.*
5. In a partition suit, judgment that partition be made is an interlocutory judgment from which no appeal lies. *McMurtry* v. *Glascock*, 432.

PARTNERSHIP.

See ATTACHMENT, 1. DECREE, 1.

1. A. owning a share of the outfit of a California gold company, executed to B. a writing, by which he sold "one half of his interest in the company." A subsequent clause provided that B. should not be a partner in the company, but only "purchaser of one half A.'s interest in the metals and ores" that might be obtained. *Held*, A.'s interest in the *outfit* did not pass. *Phillips* v. *Jones' Adm'r*, 67.
2. The widow of a partner of an insolvent firm is not entitled to dower in real estate bought by the firm as partnership property, and afterwards conveyed in payment of a partnership debt. *Duhring* v. *Duhring*, 174.
3. One partner may sue for the breach of a contract made by him in his own name, although it was made for the benefit of the firm. *Taylor* v. *Steamboat Robt. Campbell*, 254.
4. A surviving partner cannot appeal from the judgment of a county or probate court, allowing a demand against the effects of a firm in the hands of the deceased partner's administrator under the administration law, (R. C. 1845.) *Asbury* v. *McIntosh*, 278.
5. A firm composed of C. & G., and doing business under that style, was succeeded by another firm styled C., G. & Co., composed of C., G. and a son of C., which again was succeeded by a third firm of the same style as the first, but composed of C.'s son and G. During the existence of the last firm, a note was by G. given in its name to a party who had dealt with the first firm, and was without notice of its dissolution. *Held*, this was *prima facie* the note of the firm existing when it was given, and so not binding upon C., the member of the first firm of the same style. But if it was in fact given on account of that firm to a customer without notice, C. would be bound. *Pomeroy* v. *Coons*, 598.

PATENT.

1. It is settled that the fee of land disposed of by the United States remains in the government until a patent issues, and that a patent is a better legal title than a prior entry. *Carman* v. *Johnson*, 108.
2. A patent may be obtained under such circumstances that the patentee will hold the title in trust for the party making the prior entry, and may be compelled to convey by a proceeding in equity. *Ib.*

PATENT—(*Continued.*)

3. The mere fact of a prior entry is no ground of equitable relief against a patent. *Ib.*
4. In an action *at law*, a patent is conclusive of the true location of the land confirmed by the act of congress of March 3, 1807. *Maguire* v. *Vice*, 429.
5. A party who, under the present practice, seeks equitable relief against a patent, must set forth such a state of facts as would have entitled him to the relief under the old practice. *Ib.*

PHYSICIAN.

See GROCERIES AND DRAM-SHOPS.

PLEADING.

1. If a material averment permitted to be inserted in a petition at the trial by way of amendment is unanswered, it is to be taken as admitted. But if the answer contains a defence to the petition with the additional averment, the court should proceed to try the case in the same manner as if the averment had been in the petition at first and was unanswered. *Robards* v. *Munson*, 65.
2. A party seeking equitable relief under the new system of practice must state facts which would have been a ground for such relief under the old system. *Jones* v. *Brinker*, 87.
3. Where a defendant in ejectment relies in his answer upon a legal title, he cannot at the trial avail himself of a merely equitable defence. *Kennedy* v. *Daniels*, 104.
4. Under the new practice, a party who relies upon facts which would constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would formerly have been necessary in a bill in chancery. *Carman* v. *Johnson*, 108.
5. The mere statement in an answer that the defendant's entry was prior to the entry upon which the plaintiff's patent issued, is no ground of equitable relief. *Ib.*
6. It has been repeatedly held that, under the new practice, multifariousness is still an objection to a pleading. Different causes of action against different parties cannot be joined. *Robinson* v. *Rice*, 229.
7. Under the new practice, a party cannot state one cause of action, and ask that, if it proves unfounded, another cause of action may be tried. That is not a joinder of several causes of action. *Ib.*
8. In declaring upon a note, it is not necessary to set out a consideration in the declaration. *Caples* v. *Branham*, 224.
9. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Schneider* v. *Stahr*, 269.
10. Action on a non-negotiable note by the assignee against the maker. Answer—that the maker being security for the payee, the latter deposi-

PLEADING—(*Continued.*)

ted with him a chattel as a pledge for his indemnity, and thereupon, the note was given, merely as evidence of the deposit. *Held*, a good plea of want of consideration. *Doan* v. *Moss*, 297.

11. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler* v. *Servoss*, 6 Mo. Rep. 24, affirmed.) *Dowd* v. *Winters*, 361.
12. In an action on the case, begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully* and *negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all. *Martin's Ex'rs* v. *Miller*, 391.
13. A party, who, under the present practice, seeks equitable relief against a legal title, must set forth such a state of facts as would have entitled him to the relief under the old practice. *Maguire* v. *Vice*, 429.
14. In a pleading under the new practice, to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by *fraud*, without stating the facts which constitute the fraud. *Edgell* v. *Sigerson*, 494.
15. If a complainant relies upon a disability as exempting him from the operation of the statute of limitations, he should set it up in his bill. *Keeton* v. *Keeton*, 530.
16. One party who is saved from the operation of the statute of limitations by a disability, can obtain no relief upon a bill in equity jointly with other parties who are barred. *Ib.*
17. A suit for slaves claimed under a conveyance in trust should be brought in the name of the trustees and not of the beneficiaries. *Gibbons* v. *Gentry*, 468.

POWERS.

See Uses and Trusts, 1, 2, 3, 4.

PRACTICE.

See Practice in Chancery. Pleading. Supreme Court. Bill of Exceptions. Nonsuit. New Trial.

1. If a material averment permitted to be inserted in a petition at the trial by way of amendment is unanswered, it is to be taken as admitted. But if the answer contains a defence to the petition with the additional averment, the court should proceed to try the case in the same manner as if the averment had been in the petition at first and was unanswered. *Robards* v. *Munson*, 65.
2. A party seeking equitable relief under the new system of practice must

PRACTICE—(*Continued.*)

state facts which would have been a ground for such relief under the old system. *Jones* v. *Brinker*, 87.

3. In an action by legatees against an administrator upon his bond, judgment should be entered for the penalty of the bond, with an award of a single execution for the damages assessed for the breaches. Distribution of the damages among those entitled, is to be made after they are collected and brought into court. *State* v. *Ruggles*, 99.
4. Judgment reversed for an insufficient finding of the facts. *State* v. *Ruggles*, 99. *Javens* v. *Harris*, 262.
5. Where a defendant in ejectment relies in his answer upon a legal title he cannot at the trial avail himself of a merely equitable defence. *Kennedy* v. *Daniels*, 104.
6. Under the new practice, a party who relies upon the facts which would constitute a ground of equitable relief as a defence to an ejectment, must set them out in his answer with the same particularity that would for, merly have been necessary in a bill in chancery. *Carman* v. *Johnson*, 108.
7. Judgment reversed for want of a finding of the facts. *Davidson* v. *Rozier*, 132. *Jamison* v. *Hughes*, 133. *Whyte* v. *Bennett's Adm'r*, 262.
8. It has been repeatedly held that, under the new practice, multifariousness is still an objection to a pleading. Different causes of action against different parties cannot be joined. *Robinson* v. *Rice*, 229.
9. Under the new practice, a party cannot state one cause of action, and ask that, if it proves unfounded, another cause of action may be tried. That is not a joinder of several causes of action. *Ib.*
10. Where a cause is tried by a court without a jury, the supreme court will affirm if the facts found support the judgment, without regard to the instructions given or refused. *Ib.*
11. The supreme court cannot review the action of the inferior court upon a motion to strike out parts of an answer, when they are only referred to in the record by line and page of the original. *Ib.*
12. One instalment of a note due by instalments may be recovered before the others are due; and under the new practice, it would probably not be material whether the amount is sought to be recovered as a debt or damages. *Caples* v. *Branham*, 244.
13. Bill for a divorce. It appeared from the record that, after a decree *nisi*, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed. *Oliver* v. *Oliver*, 261.
14. A finding must contain a statement of facts *proved*, not a detail of evidence. *Javens* v. *Harris*, 262.
15. Bill of exceptions must be filed at term of trial. *Ruble* v. *Thomasson*, 263.
16. In a suit to foreclose a mortgage of an undivided interest in real estate, it is not proper to make a sheriff, who has made a partition sale of the land since the date of the mortgage, a co-defendant, for the purpose of obtaining an order upon him to pay over to the mortgagee the mortgagor's portion of the proceeds. *Schneider* v. *Stahr*, 269.

PRACTICE—(*Continued.*)

17. Trial by court of an appeal from a justice, and no question of law saved. Judgment affirmed. *Atken* v. *Todd*, 276.
18. A defendant after appearance cannot take advantage of a variance between the petition and the summons in the names of the plaintiffs. *Hite* v. *Hunton*, 286.
19. The insertion of an "&" between the christian and sur-name of a plaintiff in the caption of a petition, may be summarily amended. *Ib.*
20. A court cannot refuse to entertain a motion to set aside a partition because all interested do not join in the motion. *Neal* v. *Stone*, 294.
21. Judgment affirmed because no question of law was ruled below against the appellant. *Garner* v. *Beauchamp*, 318.
22. The supreme court will not disturb a non-suit voluntarily taken by a plaintiff, upon the overruling of a motion to strike out a part of the defendant's answer. (*Schulter* v. *Bockwinkle*, 19 Mo. Rep. 647, affirmed.) *Dumey* v. *Schoeffler*, 323.
23. Where a cause appealed from a justice of the peace is tried in the circuit court upon an agreed statement of facts, the supreme court will reverse unless the facts support the judgment, although no instructions are asked. *Stone* v. *Corbett*, 350.
24. After an appeal has once been granted, the power of the inferior court over the subject is exhausted. If the appeal is dismissed, or if from any cause the party loses the benefit of it, he cannot take another appeal, but must resort to his writ of error. *Brill* v. *Meek*, 359.
25. The provision in the new practice, authorizing clerks to enter judgments on the confession of the party, is constitutional. *Hull* v. *Dowdall*, 359.
26. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled. *Ib.*
27. A party objecting to the admission of a record in evidence must specify his objections. *State* v. *Gates*, 400.
28. One witness swearing that he saw two men on horseback meet in a road, and that they wheeled as they passed and had an angry conversation, and another witness, who also saw them meet, swearing that he did not see them wheel, an instruction to the jury that affirmative must prevail over negative testimony was held inapplicable and erroneous. *Ib.*
29. A new trial will not be granted on account of newly discovered evidence which is merely cumulative. *State* v. *Larrimore*, 425.
30. A party who, under the present practice, seeks equitable relief against a legal title, must set forth such a state of facts as would have entitled him to the relief under the old practice. *Mag re* v. *Vice*, 429.
31. No appeal or writ of error lies from a voluntary non-suit taken upon the refusal of the inferior court to strike out an answer as insufficient. *Louisiana & Middletown Plank Road Co.* v. *Mitchell*, 432.
32. It being important to know whether a purchaser for value of real estate

PRACTICE—(*Continued.*)

had notice of fraud vitiating the title of his vendor, the court trying the case without a jury must explicitly find upon this point. *Chouteau* v. *Nuckolls*, 442.

33. It has been repeatedly held that the practice act of 1849, (except the 25th article,) does not apply to the trial in the appellate court of a cause appealed from a justice of the peace; but the old practice must still be observed. No finding of facts is necessary. Declarations of law must be asked, and the material evidence preserved in a bill of exceptions; otherwise, the case will not be reviewed in the supreme court. *Clohecy* v. *Ragan*, 453.
34. Under the new practice, the assignee of a claim for damages upon a broken covenant of seizin must sue in his own name. He cannot sue in the name of his assignor, the covenantee; and it makes no difference that, in the instrument of assignment, the assignor authorizes suit to be brought in his name. *Vandoren* v. *Relfe*, 455.
35. After the death of an administrator, plaintiff, a succeeding administrator was substituted as plaintiff, without the appearance of the defendant, or the service of a *scire facias*. The defendant afterwards appeared, and filed a motion to set aside the order of substitution, which being overruled, he appealed to the supreme court, where the order was set aside. *Held*, this was such an appearance by the defendant as dispensed with the necessity for a *scire factas* after the cause was remanded to bring him into court; being already in court, he might be required to show cause against the proposed substitution, and upon his failure to do so, the order might be renewed. *Ferris' Adm'r* v. *Hunt*, 464.
36. Under the first section of the fourth article of the practice act of 1849, the jurisdiction of courts, in suits where land is the subject of litigation, depends exclusively upon the residence or presence of the parties, and not upon the location of the land. That section repeals the second section of the first article of the act concerning practice in chancery, (R. C. 1845.) *Miller* v. *Thurmond*, 477.
37. As by our statute, the letters of an administrator are revoked by the fact of his becoming a non-resident, he cannot afterwards be made a party to a suit in his administrative capacity. *Chouteau* v. *Burlando*, 482.
38. In a suit commenced before a justice, an account was filed, the first item of which was "balance from 1851, $97 90." *Held*, the generality of this item was no sufficient ground for dismissing the suit in the appellate court. *Busch* v. *Diepenbrock*, 568.
39. A circuit court has no power to insert a clause in a judgment, authorizing the party against whom it is rendered to move to set it aside at the next term; and where, upon motion made in pursuance of such leave, a judgment was set aside at the next term, and a new judgment rendered, it was treated as a nullity by the supreme court, and the first judgment reinstated. *Hill* v. *City of St. Louis*, 584. *Shepard* v. *City of St. Louis*, 589.
40. The supreme court will not reverse a case because the plaintiff did not

PRACTICE—(*Continued.*)

swear anew to his petition after an amendment in the caption. *Matthews* v. *Rountree*, 282.

41. The supreme court will not reverse because the inferior court refused time to answer after the overruling of a motion to dismiss for frivolous reasons. *Ib.*
42. A suit for slaves claimed under a conveyance in trust should be brought in the name of the trustees and not of the beneficiaries. *Gibbons* v. *Gentry*, 468.
43. Where the plaintiff, in a suit for wages, closes his case, having proved services, but not their *value*, but immediately afterwards offers to remedy the oversight, a court, in the exercise of its discretion, should permit him to do it. *Owen* v. *O'Reilly*, 603.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

1. A judgment of conviction in a criminal case cannot be sustained, where the record does not show that the defendant was ever in court until after verdict. *State* v. *Matthews*, 55.
2. It is the duty of the court to instruct the jury in a criminal case. If the instructions asked are objectionable in their phraseology, the court should not neglect to give such as the law of the case requires. *Ib.*
3. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle* v. *Nichols*, 326.
4. Upon a motion to quash an indictment returned into court endorsed "a true bill," members of the grand jury cannot, under our statute, be permitted to testify how they or their fellow-members did or did not vote, for the purpose of showing that twelve did not concur in finding the indictment; nor would they, it seems, be permitted to state the fact that twelve did not concur. *State* v. *Baker*, 338.
5. A law cannot be judicially declared unconstitutional, in a public prosecution, upon the admission by a circuit attorney of a fact upon which its unconstitutionality depends. *State* v. *Rich*, 393.
6. The constitutionality of a law establishing a new county cannot be inquired into upon a motion to quash an indictment found in a court of such county. *Ib.*
7. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict. *State* v. *Upton*, 397.
8. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute. *Ib.*
9. A second change of venue may be granted where the judge has been counsel in the cause, notwithstanding the twenty-eighth section of article five of the act concerning practice and proceedings in criminal cases. (R. C. 1845.) *State* v. *Gates*, 400.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES—(*Cont'd.*)

10. A recognizance taken by a justice, conditioned that a party charged with crime shall appear before the proper court at its next term, is not void for omitting to add "to answer the charge" or "to answer an indictment." *State* v. *Davidson*, 406.
11. A recognizance cannot be *quashed*. Its validity can only be contested upon a *scire facias* after forfeiture. *Ib.*
12. A grand jury may be summoned and an indictment found at an adjourned term by statute. *State* v. *Barnes*, 413.

PRACTICE IN CHANCERY.

See PRACTICE, 36. USES AND TRUSTS, 7.

1. A bill of review for errors apparent on the face of the record, will not lie after the time when the writ of error could be brought. *Creath* v. *Smith & Atkins*, 113.
2. In this state, a decree against infants, for the sale of real estate held by their ancestor and another as partnership property, for the payment of the partnership debts, is not erroneous because no day is given them after coming of age to show cause against it. SCOTT, J., dissenting. *Ib.* 113.
4. The provision in the act regulating practice in chancery, (R. C. 1845,) that a decree rendered against a party who has not been summoned and has not appeared, may be set aside within a time limited, applies to a decree for a divorce. SCOTT, J., dissenting. *Smith* v. *Smith*, 166.
5. Where a bill is filed for the specific performance of a contract to convey land, the court cannot make an order requiring defendants before the court to defend for all parties interested. *McQueen* v. *Chouteau's Heirs*, 222.
6. Under the chancery practice which formerly prevailed, an answer, if responsive to the bill, was to be taken as true, if no replication was filed. *Ib.*

PRINCIPAL AND AGENT.

1. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable *in an action upon the note*, upon proof of his want of authority. *Byars* v. *Doores*, 284.
2. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (SCOTT, J., dissenting.) *Wheeler* v. *Barret*, 573.
3. Although a bill purports to have been drawn by an agent under a special written authority, other evidence is admissible to establish his authority, so as to relieve him from personal liability on the bill, as a person acting without authority. (SCOTT, J., dissenting.) *Page & Bacon* v. *Lathrop*, 589.
4. Can a payee, who receives a bill, drawn by an agent in the name of his principal under a written authority shown to him at the time, after-

PRINCIPAL AND AGENT—(*Continued.*)

wards charge the agent as principal, as having drawn without authority? *Ib.*

PRINCIPAL AND SURETY.

See CONSTABLE, 1, 2.

1. The principal and security in a recognizance to answer an indictmen acknowledged themselves *each* to be bound in a specified sum. *Held*, their liability was several and not joint, and a remission by the governor after forfeiture in favor of the principal would not discharge the security. *State* v. *Davidson*, 212.

PROCESS.

1. A widowed sister keeping house for her brother, is a "member of his family," upon whom process may be served. *Wade* v. *Jones*, 75.
1. The president is the proper party upon whom to serve process against a corporation. *Chamberlin* v. *The Mammoth Mining Co.*, 96.

PROMISSORY NOTES.

See BONDS AND NOTES, 4, 5, 6, 7.

1. Note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff. *Ranney* v. *Brooks & Ervin*, 105.
2. A note was signed "A. B., attorney for C. D." *Held*, A. B. was personally liable *in an action upon the note* upon proof of his want of authority. *Byars* v. *Doores*, 284.
3. Action on a non-negotiable note by the asssignee against the maker. Answer—that the maker being security for the payee, the latter deposited with him a chattel as a pledge for his indemnity, and thereupon, the note was given merely as evidence of the deposit. *Held*, a good plea of want of consideration. *Doan* v. *Moss*, 297.
4. The assignee of a note given for part of the consideration of a contract of sale will not be affected by a subsequent judicial rescision of the contract in a proceeding to which he was not a party. *Powers* v. *Heath's Adm'r*, 319.
5. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning bonds and notes, (R. C. 1845.) *Smith* v. *Ashby*, 354.
6. It is a good defence to a note given for the purchase money of land conveyed with warranty, that the purchaser acquired no title. *Hobein* v. *Drewell*, 450.
7. A party who puts his name upon the back of a negotiable note, to which, at the time, he is not a party, is *prima facie* liable as maker; and although, as between parties entitled to look into the real transac-

PROMISSORY NOTES—(*Continued.*)

tion, it may be shown that he signed as endorser, this cannot be shown against a party who took the note in the usual course of business, before it was due, without notice and for value. *Schneider* v. *Schiffman*, 571.

8. A. executed and delivered his note to B., who was to negotiate the same, and with the proceeds pay a note about to become due from A. to C. B. retained the note until after it purported to be due, and then negotiated the same to an innocent party for value, and converted the proceeds to his own use. A. was relieved against the payment of the note. (SCOTT, J., dissenting.) *Wheeler* v. *Barret*, 573.
9. A firm composed of C. & G., and doing business under that style, was succeeded by another firm styled C., G. & Co., composed of C., G. and a son of C., which again was succeeded by a third firm of the same style as the first, but composed of C.'s son and G. During the existence of the last firm, a note was by G. given in its name to a party who had dealt with the first firm, and was without notice of its dissolution. *Held*, this was *prima facie* the note of the firm existing when it was given, and so not binding upon C., the member of the first firm of the same style. But if it was in fact given on account of that firm to a customer without notice, C. would be bound. *Pomeroy* v. *Coons*, 598.

PROVOCATION.

1. What provocation will mitigate a murder is a question of law. (*State* v. *Dunn*, 18 Mo. Rep. affirmed.) *State* v. *Jones*, 58.

PUBLIC LANDS.

See LANDS AND LAND TITLES.

1. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield* v. *Branson*, 301.

RAILROAD.

1. Under the charter of the Hannibal and St. Joseph railroad company (Sess. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal & St. Joseph Railroad Co.* v. *Morton*, 70.
2. The mere fact that a party is a contractor on a railroad is not sufficient to make him, as a matter of law, *prima facie* liable for the board of hands employed on his section of the road; especially when there is a sub-contractor. *Cahill* v. *Ragan*, 451.

RECOGNIZANCE.

1. The principal and security in a recognizance to answer an indictment acknowledged themselves *each* to be bound in a specified sum. *Held*, their liability was several and not joint, and a remission by the governor

RECOGNIZANCE—(*Continued.*)

after forfeiture in favor of the principal would not discharge the security. *State* v. *Davidson*, 212.

2. A gubernatorial remission from liability upon a recognizance to appear in one county cannot be made to apply to a recognizance to appear in a different county. *Ib.*
3. A recognizance taken by a justice, conditioned that a party charged with crime shall appear before the proper court at its next term, is not void for omitting to add "to answer the charge" or "to answer an indictment." *State* v. *Davidson*, 406.
4. A recognizance cannot be *quashed*. Its validity can only be contested upon a *scire facias* after forfeiture. *Ib.*

RECORDS.

1. A party objecting to the admission of a record in evidence must specify his objections. *State* v. *Gates*, 400.

RECOUPMENT.

See DAMAGES, 5.

ROADS AND HIGHWAYS.

1. A party who is prosecuted, (under sections 59 and 60 of article one of the act concerning roads and highways, (R. C. 1845,) for obstructing a public way over his own land, may show that his property has not been condemned for public use in the manner prescribed by law. *Golahar* v. *Gates*, 236.
2. An indictment under the 57th section of article one of the act concerning "roads and highways," (R. C. 1845,) must distinctly charge that the fork of the road at which the defendant failed to place a finger board, is within the road district of which he was overseer; and to constitute an offence under this section, the roads forming the fork must not terminate at the same point. *State* v. *Tuley*, 422.

SALARY.

1. The provision, in the act establishing the St. Louis land court approved February 23, 1853, that the judge should receive the same compensation as the judge of the St. Louis court of common pleas then received, means, not only that he should receive the *same amount*, but from the *same sources*. *Bates* v. *St. Louis County Court*, 499.

ST. LOUIS LAND COURT.

See SALARY.

SALE.

See AGREEMENT, 1. As to CONDITIONAL SALE, see MORTGAGE 11. As to recoupment of damages, see DAMAGES 5.

1. Where a vendor is in possession of personal property, and sells for full value, a warranty of title is implied. *Robinson* v. *Rice*, 229.
2. A husband, in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser. *Ib.*
3. Partition sale set aside, where it appeared that the bidders, for the purpose of obtaining the property at a sacrifice, agreed that one should

SALE—(*Continued.*)

become the purchaser, and the others refrain from bidding, in consideration of sharing the benefits of the purchase. *Wooton* v. *Hinkle*, 290.

4. A court cannot refuse to entertain a motion to set aside a partition sale because all interested do not join in the motion. *Neal* v. *Stone*, 294.
5. A partition sale will be set aside, where the evidence shows any collusion or contrivance to enable the purchaser to obtain the land below its real value. *Ib.*
6. The sale of an improvement on public land is a sufficient consideration to support a promise to pay for it, although the vendor does not actually reside upon the land at the time of sale. *Stubblefield* v. *Branson*, 301.
7. To avoid a sale of goods on credit, it is not sufficient that the purchaser did not intend to pay for them *at the time agreed upon*. He must, when he buys, intend *never* to pay for them, to prevent the title from passing; and this is a question for a jury. *Bidault* v. *Wales*, 546.
8. Although a vendor may avoid a sale as against the purchaser, yet this cannot be done when the rights of third parties have intervened. This exception however does not embrace creditors of the purchaser seizing the property by attachment or under execution, or taking it by assignment as a security for pre-existing debts. Whether it would extend to the protection of the lien of a factor of the purchaser for a general balance, or a lien in relation to the specific property, left open. *Ib.*
9. As a general rule, goods existing separately and ready for immediate delivery, are the only proper subjects of a common law sale, which is, strictly speaking, a transaction operating as a present transfer of title, and does not include executory contracts for the sale and delivery of goods to be separated from a larger mass, or to be afterwards procured or manufactured for the buyer. *Cunningham* v. *Ashbrook*, 553.
10. To constitute a delivery, within the meaning of the statute of frauds, there must be not only a change of the actual possession, but a change of the civil possession, which is a holding of the thing, with the design of keeping it as owner; and this is a question of fact for a jury. *Ib.*
11. The principle that, in a sale of goods, no title passes, while any act, such as counting, weighing or measuring, remains to be done by the seller, is only applicable when such act is necessary to separate the goods from a larger mass; and does not apply to the sale upon fixed terms, by weight to be subsequently ascertained, of goods already separated, in which case the title passes by delivery; and as a consequence, the loss by a destruction of the goods, after they are delivered and before they are weighed, will fall upon the buyer. *Ib.*
12. Although there is no sale until the price is settled, yet it is settled, within the meaning of this rule, where the terms are so fixed that the sum to be paid can be ascertained by weighing, without further reference to the parties themselves. *Ib.*
13. As in the sale of an entire drove of hogs, upon fixed terms, by net weight, a jury would be at liberty to infer delivery from change of

SALE—(*Continued.*)

possession, an instruction which would be understood to assert, as a matter of law, that this inference would be repelled by the fact that the hogs were to be subsequently weighed, is erroneous. *Ib.*

14. A contract for the sale and delivery of goods, which is so completed as to be valid in the state where it is made, will be enforced in this state, unaffected by the sixth section of our statute of frauds. *Houghtaling* v. *Ball & Chapin*, 563.

SCHOOL LANDS.

1. An indictment under the thirtieth section of the act concerning "school lands," (R. C. 1845,) which charges the defendant with committing "waste, trespass *and* other injury," &c., "by cutting down *and* carrying away timber," &c., is not bad for duplicity. *State* v. *Myers*, 409.

SCIRE FACIAS.

See PRACTICE, 35.

SECURITIES.

See PRINCIPAL AND SURETY. CONSTABLE.

SET-OFF.

1. In an action by the general assignees of an insolvent, to recover a debt due the assignor, the defendant was allowed to set up as an equitable defence or set-off the amount of a note paid by him after the assignment, as security of the assignor upon a note which was under protest at the date of the assignment. *Morrow's Assignees* v. *Bright*, 298.
2. A note not negotiable under the statute, but expressed to be "payable without defalcation or discount," is still exempt from any set-off accruing against the assignor after assignment and before notice of it. The third section of the third article of the new practice act does not repeal the third section of the act concerning bonds and notes, (R. C. 1845.) *Smtth* v. *Ashby*, 354.
3. A party sued before a justice filed as an off-set an account exceeding the justice's jurisdiction, but attempted to be brought within it by a credit for the amount of the plaintiff's demand. *Held*, this could not be allowed as a set-off. *Almeida* v. *Sigerson*, 497.

SHERIFF.

1. A note given to a sheriff for the purchase money of land sold in partition, and showing on its face the consideration for which it was given, cannot be assigned so as to enable the assignee to recover the amount after the expiration of the sheriff's term of office, against the order of the court requiring it to be paid to the succeeding sheriff. *Ranney* v. *Brooks*, 105.

SHERIFF'S DEED.

1. Smallness of consideration in a sheriff's deed not sufficient to affect a purchaser from the sheriff's vendee with notice of fraud in the title of his vendor. *Chouteau* v. *Nuckolls*, 442.
2. D. was originally the owner of 10,256 arpens of land, out of which he had conveyed 4000 arpens to his son, and afterwards mortgaged 4426

SHERIFF'S DEED—(*Continued.*)

arpens described as his remaining interest in the tract. A sheriff's deed subsequently conveyed all his interest in the whole tract *except* 4426 *arpens* described as *sold by the sheriff at a previous term of the court*, of which previous sale there was no evidence in the record. *Held*, the sheriff's deed passed no interest in the 4426 arpens covered by the mortgage. *Chouteau* v. *Burlando*, 482.

SHERIFF'S SALE.

See SALE, 3, 4, 5.

SLANDER.

See PLEADING, 11. VARIANCE.

1. In an action of slander, for a charge of false swearing before a grand jury, where the defendant justifies by pleading the truth of the charge, a grand juror cannot (under sections 15 and 17 of article 3 of the act concerning practice and proceedings in criminal cases,) be permitted to testify how the plaintiff swore before the grand jury. *Tindle* v. *Nichols*, 326.
2. The words "you swore to a lie before the grand jury" held actionable. *Perselly* v. *Bacon*, 330.
3. The words "you swore to a lie before the grand jury" being actionable in themselves, no *colloquium* is necessary to show their application; and if the petition contains one, it may be rejected as surplusage, although it shows that the words were used in allusion to the testimony given in a matter where perjury could not be committed, unless it appears that the allusion was explained by the defendant, so as to be understood at the time of making the charge. *Ib.*
4. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler* v. *Servoss*, 6 Mo. Rep. 24, affirmed.) *Dowd* v. *Winters*, 361.

SLAVES.

1. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. Slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing the slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert* v. *Rider & Allen*, 146.
2. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass. *Ib.*
3. Under the 35th section of article 9 of the act concerning "crimes and punishments," (R. C. 1845,) if the slaves of several persons unite in the commission of a larceny, the owner of one of the slaves will be liable for all the damages. *Fackler* v. *Chapman*, 249.

SLAVES—(*Continued.*)

4. In an action against a master for a larceny committed by his slave, the *declarations* of the slave, as to where the stolen property might be found, are admissible in evidence, in connection with the *fact* that the property was found at the place mentioned. The declaration may be proved by one witness and the fact by another. *Ib.*

SPANISH LAW.

See COMMUNITY.

SPECIFIC PERFORMANCE.

1. It is optional with a party who has made a parol contract to convey land, to avail himself of the plea of the statute of frauds or not. (*McGowen* v. *West*, 7 Mo. Rep. 570, affirmed.) *Farrar* v. *Patton*, 81.
2. Where one party to a contract has been placed in such a position by a total or partial performance that it would be a fraud on him if the contract was not fully executed, equity will interfere notwithstanding the statute of frauds, the terms of the contract plainly appearing. *Ib.*
3. A party who purchases land with notice of a previous parol contract to convey to another, will stand precisely in the situation of his grantor, when a specific performance is sought be enforced. *Ib.*
4. Mere part payment of the purchase money is not sufficient to entitle a party to the specific performance of a contract to convey land. *Parke* v. *Leewright*, 85.
5. Valuable improvements, to be a ground for enforcing a specific performance, must have been made with the expectation that the contract would be fulfilled, and not after it was known that it would not be. *Ib.*
6. Where a bill is filed for the specific performance of a contract to convey land, the court cannot make an order requiring defendants before the court to defend for all parties interested. *McQueen* v. *Chouteau's Heirs*, 222.
7. Where a party files a bill in equity for the specific performance of a contract for the conveyance of land, knowing at the time that it is not in the power of the defendant specifically to perform the contract, the court will not, in ordinary cases, decree to him compensation in damages, but will leave him to his remedy at law for a breach of the contract. *McQueen* v. *Chouteau's Heirs*, 222.

STATUTES, CONSTRUED AND COMMENTED UPON.

Administration, (R. C. 1845,) article 2, sec. 24. *Penn* v. *Watson*, 13. *Stein* v. *Weidman*, 17.
article 7, secs. 5, 7 and 8. *The State* v. *Ruggles*, 99.
article 1, sections 49 to 56. *Asbury* v. *McIntosh*, 278.
article 4, section 1. *Harness* v. *Green's Administrator*, 316.
article 1, section 58. *Chouteau* v. *Burlando*, 482.

Assignments, (R. C. 1845.) *Page & Bacon* v. *Gardner*, 507.

STATUTES—(*Continued.*)

Boats and Vessels, (R. C. 1845,) 4th subdivision of section 1. *Taylor* v. *Steamboat Robt. Campbell*, 254.

Bonds and Notes, (R. C. 1845,) section 1. *Caples* v. *Brenham*, 244.
section 3. *Smith* v. *Ashby*, 354.
section 6. *Stone* v. *Corbett*, 350.

Corporations, (R. C. 1845,) article 2, sec. 2. *Chamberlin* v. *The Mammoth Mining Co.*, 96.

Chouteau Spring Co., act incorporatiug, (Sess. Acts of 1849, p. 168.) *Chouteau Spring Company* v. *Harris*, 382.

Crimes and Punishments, (R. C. 1845,) article 3, section 38. *State* v. *Matthews*, 55.
article 2, section 1. *State* v. *Jones*, 58.
article 8, section 8. *State* v. *Byron*, 210.
art. 1, secs. 31, 32, 33 and 34. *State* v. *Ambs*, 214.
article 9, section 35. *Fackler* v. *Chapman*, 249.
article 8, secs. 40, 41 and 42. *State* v. *Shiflett*, 415.
art. 8, sec. 8. *State* v. *Bess*, 419. *State* v. *Wilhight*, 422.

Divorce, (R. C. 1845,) section 2. *Smith* v. *Smith*, 166.

Execution Exemption Act, (R. C. 1845, Sess. Acts of 1847.) *Wade* v. *Jones*, 75.

Execution Act of 1849, exempting property of husbands and wives for each other's debts, (Sess. Acts of 1849, p. 67.) *Tally* v. *Thompson*, 277. *Cunningham* v. *Gray*, 170. *Schneider* v. *Stathr*, 269.

Executions to other counties, Act concerning, (Sess. Acts of 1849, p. 52.) *Hobein* v. *Murphy*, 447. *Hobein* v. *Drewell*, 450.

Frauds and Perjuries, (R. C. 1845,) sec. 5. *Farrar* v. *Patton*, 81. *McIlvaine* v. *Harris*, 457. *Parke* v. *Leewright*, 85.

Fraudulent Conveyances, (R. C. 1845,) sec. 1. *Brooks* v. *Wimer*, 503.

Groceries and Dram Shops, (R. C. 1845,) section 1. *State* v. *Larrimore*, 425.
sections 1 and 2. *State* v. *Searcy*, 489.

Hannibal and St. Joseph Railroad Co., Act incorporating, (Sess. Acts 1847, p. 156. *Hannibal & St. Joseph Railroad Co.* v. *Morton*, 70.

Justices' Courts, (R. C. 1845,) article 6, section 2. *Chamberlin* v. *The Mammoth Mining Co.*, 96.

STATUTES—(*Continued.*)

Land Court, St. Louis, Act establishing, (Session Acts, 1853, p. 90.) *Bates* v. *St. Louis County Court*, 499. *Hull* v. *McCune*, 596.

Limitations, (R. C. 1845,) article 2, sec. 7. *Garth* v. *Robards*, 523.

Mortgages, (R. C. 1845,) secs. 22, 23 and 24. *Phelps* v. *Relfe*, 479.

Partition, (R. C. 1845,) section 37. *Ranney* v. *Brooks & Ervin*, 105.

Practice Act of 1849, article 25, secs. 1 and 2. *Penn* v. *Watson*, 13. *Stein* v. *Weidman*, 17.

article 3, section 3. *Smith* v. *Ashby*, 354.

article 19, section 8. *Brill* v. *Meek*, 358.

article 22, (confession of judgment.) *Hull* v. *Dowdall*, 359.

article 3, secs. 1 and 2. *Vandoren* v. *Relfe*, 455.

article 15, section 2. *Javens* v. *Harris*, 262.

article 4, sec. 1, held to repeal section 2 of article 1 of the chancery practice act of 1845. *Miller* v. *Thurmond*, 477.

Practice in Chancery, (R. C. 1845,) art. 1, sec. 1. *Creath* v. *Smith & Atkins*, 113.

article 6, secs. 1, 2, 3, 4. *Smith* v. *Smith*, 166.

Practice and Proceedings in Criminal Cases, (R. C. 1845,)

sections 15 and 17, article 3. *Tindle* v. *Nichols*, 326.

section 16, article 3. *State* v. *Baker*, 338.

article 7, section 1. *State* v. *Upton*, 397.

article 5, section 28. *State* v. *Gates*, 400.

article 2, section 26. *State* v. *Davidson*, 406.

article 3, section 13. *State* v. *Barnes*, 413.

Roads and Highways, (R. C. 1845,) article 1, section 57. *State* v. *Tuley*, 422.

article 1, secs. 59 and 60. *Golahar* v. *Gates*, 236.

School Lands, (R. C. 1845,) section 30. *State* v. *Myers*, 409.

Slaves, (R. C. 1849,) article 1, sections 31 and 32. *Calvert* v. *Rider & Allen*, 146.

St. Louis, Act to provide general system of sewerage in, (Sess. Acts of 1849, p. 519.) *Page* v. *City of St. Louis*, 136.

Wills, (R. C. 1845,) section 5. *Northcutt* v. *Northcutt*, 266.

Witnesses, (R. C. 1845,) section 8. *Ex parte Mallinkrodt*, 493.

ST. LOUIS, CITY OF.

See TAXES.

ST. LOUIS, CITY OF—(*Continued.*)

1. Under ordinance No. 3037 of the city of St. Louis, approved July 29, 1853, supplementary to ordinance No. 2952, approved January 7, 1853, flour manufactured in the city was not required to be submitted for inspection before sale. *City of St. Louis* v. *Shands*, 149.

STOCK.

See CORPORATIONS, 3

SUMMONS.

See VARIANCE.

SUNDAY.

1. The laws enforcing the observance of Sunday, (R. C. 1845, tit. Crimes and Punishments, article 8, secs. 31, 32, 33 and 34,) are constitutional. *State* v. *Ambs*, 214.
2. A dram-shop license does not authorize the holder to sell liquor on Sunday. *Ib.*
3. Keeping open an ale house and selling ale on Sunday are two distinct offences, under the 34th section of the act above referred to. A defendant, who pleads guilty to an indictment containing one count for each offence, is subject to two fines. *Ib.*
4. In an action on the case, begun before the new practice act, to recover damages caused by the act of the defendant in putting out upon his land fire which extended to the land of the plaintiff, and burned his fence, the declaration alleged that the defendant *wrongfully* and *negligently* did the act on a specified day of the month, without naming the day of the week. At the trial, the plaintiff sought to recover on the sole ground that the fire was put out on *Sunday*, which fell upon the day of the month named in the declaration, and so the act of the defendant was *unlawful*, and he responsible for all its consequences. *Held*, under the declaration, this ground of recovery could not be made available, if at all. *Martin's Ex'rs* v. *Miller*, 391.

SUBPŒNA DUCES TECUM.

See NOTARY PUBLIC.

SUPREME COURT.

See RULES OF, 605.

1. Judgment reversed for an insufficient finding of the facts. *State* v. *Rugles*, 99. *Javens* v. *Harris*, 262.
2. Judgment reversed for want of any finding of the facts. *Davidson* v. *Rozier*, 132. *Jamison* v. *Hughes*, 133. *Whyte* v. *Bennett's Administrator*, 262.
3. Where a cause is tried by a court without a jury, the supreme court will affirm if the facts found support the judgment, without regard to the instructions given or refused. *Robinson* v. *Rice*, 229.
4. The supreme court cannot review the action of the inferior court upon a motion to strike out parts of an answer, when they are only referred to in the record by line and page of the original. *Ib.*
5. Bill for a divorce. It appeared from the record that, after a decree

SUPREME COURT—(*Continued.*)

nist, the plaintiff was heard upon the merits and his bill dismissed. No exceptions saved. Judgment affirmed. *Oliver* v. *Oliver*, 261.

6. Judgment affirmed for want of bill of exceptions, the cause having originated before a justice, and nothing appearing in the record to warrant a disturbance of the judgment. *Elliott* v. *Pogue*, 263.
7. Bill of exceptions stricken out, because not filed at the term at which the trial took place, no reason for the delay appearing on the record. *Ruble* v. *Thomasson*, 263.
8. The supreme court will not reverse a judgment for excessive damages unless in a very clear case. *Woodson* v. *Scott*, 272.
9. Trial by a court of an appeal from a justice, and no question of law saved. Judgment affirmed. *Aiken* v. *Todd*, 276.
10. The supreme court will not reverse a case because the plaintiff did not swear anew to his petition after an amendment in the caption. *Matthews* v. *Rountree*, 282.
11. The supreme court will not reverse because the inferior court refused time to answer after the overruling of a motion to dismiss for frivolous reasons. *Ib.*
12. Judgment affirmed because no question of law was ruled below against the appellant. *Garner* v. *Beauchamp*, 318.
13. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff, the recovery being limited to the damages for the mere taking of the timber. *Pearson* v. *Inlow*, 322.
14. The supreme court will not disturb a non-suit voluntarily taken by a plaintiff, upon the overruling of a motion to strike out a part of the defendant's answer. (*Schulter* v. *Bockwinkle*, 19 Mo. Rep. 647, affirmed.) *Dumey* v. *Schoeffler*, 323.
15. Where a cause appealed from a justice of the peace is tried in the circuit court upon an agreed statement of facts, the supreme court will reverse unless the facts support the judgment, although no instructions are asked. *Stone* v. *Corbett*, 350.
16. The supreme court will not reverse a judgment overruling a motion to quash an execution upon a judgment by confession, because of an omission by the clerk to endorse the judgment upon the written statement of the defendant; especially, when the endorsement was made *nunc pro tunc* before the motion was overruled. *Hull* v. *Dowdall*, 359.
17. The supreme court will not refuse to set aside a nonsuit taken upon the rejection of material evidence necessary to the plaintiff's recovery, because the record does not show that the plaintiff was prepared with proof upon the other material facts of the case, or because the evidence may possibly have been rejected for the reason that it was offered out of the order of time prescribed by the court trying the cause. *Dowd* v. *Winters*, 361.

SUPREME COURT—(*Continued.*)

18. The supreme court will not revise the discretion exercised by inferior courts in allowing amendments, unless it clearly appears that the discretion has been abused to the prejudice of the party. *Cullum* v. *Cunditf*, 522.
19. A case where the supreme court refused to reverse a judgment for excessive damages. *Barth* v. *Merritt*, 567.
20. Where a bill in chancery, to which limitation was set up as a bar, contained no allegation of any exempting disability, but it appeared in evidence that some of the complainants had been under a disability which prevented a bar, though the others had not, the supreme court reversed a decree dismissing the bill, in order to afford an opportunity to amend, so as to save the rights of those who were not barred. *Keeton* v. *Keeton*, 530.
21. It has been repeatedly held that the practice act of 1849, (except the 25th article,) does not apply to the trial in the appellate court of a cause appealed from a justice of the peace; but the old practice must still be observed. No finding of facts is necessary. Declarations of law must be asked, and the material evidence preserved in a bill of exceptions; otherwise, the case will not be reviewed in the supreme court. *Clohecy* v. *Ragan*, 453.

SURVEYOR GENERAL.

1. A surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice and in good faith, he exercises his judgment. *Reed* v. *Conway*, 22.

TAXES.

1. The illegal exemption by city ordinance of the property of one tax payer from assessment for a special sewer tax, will not authorize an injunction to restrain the city from collecting the assessment against another tax payer, not exceeding the amount which the city was authorized to impose; certainly not, unless it appears that, upon payment of the assessment sought to be enjoined, the plaintiff will have paid more than would have been his proportion had it not been for the exemption. *Page* v. *City of St. Louis*, 136.
2. A party cannot maintain an action to recover back from a city illegal taxes paid by him without objection. (*Walker* v. *City of St. Louis*, 15 Mo. Rep. 563, affirmed.) *Christy's Adm'r* v. *City of St. Louis*, 143.
3. A municipal corporation has capacity to take personal if not real property, unless restrained by its charter. So, a party who has voluntarily paid to the city of St. Louis illegal taxes assessed under color of law, cannot maintain an action to recover them back on the ground that the city has no capacity to take money which it has no right by charter to demand. *Christy's Adm'r* v. *City of St. Louis*, 143.
4. The same principle applies to an administrator who voluntarily pays illegal taxes upon the estate of his intestate, as to a person acting for himself. Neither can maintain an action to recover back. *Ib.*

TAXES—(*Continued.*)

5. Nor can an administrator recover back illegal taxes paid without objection to a former administrator. *Ib.*

TELEGRAPHIC DISPATCH.

See EVIDENCE, 11, 13. AGREEMENT, 13, 15.

TIME.

See LIMITATIONS.

1. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfering to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Thompson* v. *Lyon*, 155.
2. A mortgagee against whom a suit is brought to redeem cannot defend upon the ground of the staleness of the claim, unless the facts would constitute a bar in equity. *Bollinger* v. *Chouteau*, 89.

TRESPASS.

1. An injunction does not lies to restrain a trespass upon a franchise, unless the trespasser is insolvent or the injury irreparable. *James* v. *Dixon*, 79.
2. The satisfaction of a judgment for the value of a slave carried out of this state by a boat, recovered in the statutory action against the master or owner, or against the boat itself, (R. C. 1845, tit. slaves, art. 1, secs. 31, 32,) is no bar to the common law action by the owner against all those concerned in removing a slave. But a recovery and satisfaction under one section of the statute is a bar to a recovery under the other section. *Calvert* v. *Rider & Allen*, 146.
3. The clerk of a boat, who received the passage money from a slave, carried out of the state under circumstances which would make the master liable as a trespasser, may, in the absence of further proof, properly be found to have assented to the trespass. *Ib.*
4. A party may recover the value of timber cut upon his land, although by mistake he led the defendant to believe that he was cutting the timber on his own land. In such a case, where an action of trespass is commenced before a justice, by filing a complaint in the form of an account, the supreme court will not disturb a judgment for the plaintiff, the recovery being limited to the damages for the mere taking of the timber. *Pearson* v. *Inlow*, 322.

TRUSTS AND TRUSTEES.

See USES AND TRUSTS.

USES AND TRUSTS.

See LANDS AND LAND TITLES, 2. FRAUDULENT CONVEYANCES, 2.

1. An infant cannot execute a power of appointment coupled with an interest. *Thompson & Wife* v. *Lyon*, 155.
2. The disability of infancy cannot be dispensed with by the instrument creating the power. *Ib.*
3. Mere lapse of time, short of the period which would be a bar by the statute of limitations, will not prevent a court of equity from interfer-

USES AND TRUSTS—(*Continued.*)
ing to divest a legal title which has been conveyed by a trustee, by direction of an infant beneficiary exercising a power of appointment. *Ib.*
4. A court of equity, however, will not, in such a case, interfere against a purchaser for a valuable consideration without notice. *Ib.*
5. A conveyance by a trustee passes the *legal title*, although he may be guilty of a breach of trust. *Gale* v. *Mensing*, 461.
6. A conveyance to trustees, for the benefit of creditors who should sign it, is not, as a matter of law, void, because of the omission of the creditors to sign it. *Ib.*
7. G. in Kentucky, in 1829, executed a deed for slaves to trustees, to be held, with their increase, *for the benefit of G. and wife during their lives*, and after their deaths to be divided among their children. This deed was acknowledged and recorded. The certificate of acknowledgment ran in the name of J. B., clerk of the county court, but was signed at the foot "J. B., by J. J. A., deputy clerk." G. remained in possession of the slaves, and shortly afterwards removed with them to Missouri, where he sold two of them to the defendant, who had notice of the deed, and the surviving trustee joined in the bill of sale. In a suit brought by the children of G., after the death of himself and wife, to recover the two slaves thus sold and their increase, *Held*, that the deed was not void upon its own face under the laws of Kentucky in force when it was executed, and that the acknowledgment was sufficient; that the legal title not being in the plaintiffs, the suit was not properly brought; that it should have been in the name of the trustees, or if they were dead, or refused to accept the trust, the petition should have been framed for the appointment of trustees, or for the execution of the trust without their intervention. *Gibbons* v. *Gentry*, 468.
8. Where an administrator, at a fraudulent sale made by him, becomes the purchaser of slaves belonging to the estate of his intestate, and afterwards, with the knowledge of the heirs, openly and notoriously asserts title in himself, a bill in equity cannot be maintained against him for relief, after the lapse of the period which is a bar by the statute of limitations. *Keeton* v. *Keeton*, 530.

VENDOR AND VENDEE.
See SALE.

VARIANCE.
1. A defendant after appearance cannot take advantage of a variance between the petition and the summons in the names of the plaintiffs. *Hite* v. *Hunton*, 286.
2. An allegation in a petition for slander that the defendant charged the plaintiff with swearing falsely in a judicial proceeding between A., plaintiff, and B., defendant, is sustained by proof of such a proceeding between A., plaintiff, and B. and C., defendants. (*Hibler* v. *Servoss*, 6 Mo. Rep. 24, affirmed.) *Dowd* v. *Winters*, 361.

VENDOR AND PURCHASER.
See SALE.
1. Smallness of consideration in a sheriff's deed, of itself, under the cir-

VENDOR AND PURCHASER—(*Continued.*)

cumstances of the case, *held* not sufficient to affect a purchaser from the sheriff's vendee with notice of fraud in the title of his vendor. *Chouteau* v. *Nuckolls*, 442.

2. It being important to know whether a purchaser for value of real estate had notice of fraud vitiating the title of his vendor, the court trying the case without a jury must explicitly find upon this point. *Ib.*
3. The heirs of an intestate, by obtaining a decree for the legal title to real estate of which he died seized in equity, cannot defeat the right of the administrator to sell his equity for the payment of debts; and the purchaser at the administration sale may enforce a conveyance of the legal title. *Wolf* v. *Robinson*, 459.
4. The title of the purchaser at an administration sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding. *Ib.*
5. A court of equity will not interfere against a purchaser for a valuable consideration without notice from the trustee of an infant beneficiary under the latter's exercise of a power of appointment. *Thompson* v. *Lyon*, 155.
6. A husband in possession of slaves under a will which gives his wife a life estate, cannot pass an absolute estate to a purchaser. *Robinson* v. *Rice*, 229.
7. The title of the purchaser at an administrator sale does not depend upon the truth of the facts stated in the petition upon which the order of sale was made. This cannot be contested in a collateral proceeding. *Wolf* v. *Robinson*, 459.

VENUE.

1. A second change of venue may be granted where the judge has been counsel in the cause, notwithstanding the twenty-eighth section of article five of the act concerning practice and proceedings in criminal cases. (R. C. 1845.) *State* v. *Gates*, 400.
2. "The county aforesaid" in an indictment not a sufficient venue, where two counties have been previously named. *State* v. *McCracken*, 411.
3. A judgment rendered in a court of one county, in a cause taken by a second change of venue *by consent of parties* from another county, though irregular, is not void, and a title acquired under it cannot be impeached in a collateral proceeding. *Chouteau* v. *Nuckolls*, 442.

VERDICT.

7. A verdict will not, it seems, be set aside because the jury used intoxicating liquor in their retirement, unless it appears that it was supplied from an improper source, or affected the verdict. *State* v. *Upton*, 397.
8. Upon an indictment for murder, a verdict of "guilty in manner and form as charged in the indictment," will not support a judgment. The degree must be specified, under the statute. *Ib.*

WARRANTY.

1. Where a vendor is in possession of personal property, and sells for full value, a warranty of title is implied. *Robinson* v. *Rice*, 229.

WILL.

1. A court will not interfere to establish the validity of a charity in a will, depending upon a contingency which has not arisen and may never arise. *The State* v. *Prewett*, 165.
2. A will described land devised as the "south-east and south-west quarters of section 4, in township 60, range 38, in Holt county, Missouri." The devisee of the south-west quarter was to have access to the "Big Spring." *Held*, parol evidence that the corresponding quarter sections of township *fifty-nine*, in the same range and county, were intended to be devised, was admissible, it appearing that the "Big Spring" was upon the south-east quarter of section 4, in township fifty-nine, and that the testator never owned or claimed any land in section 4 of township 60. *Riggs* v. *Myers*, 239.
3. If a testator's name is signed to a will by another at his request, and he then makes his mark, this is not a sufficient signing by the testator himself, but the will must be attested as required by the fifth section of the act concerning wills, (R. C. 1845.) *Northcutt* v. *Northcutt*, 266.
4. A will contained this clause: "I wish all my money placed out on interest, on undoubted security, so that the interest may support my children not of age, until they become of age or marry." *Held*, upon the marriage of one of the daughters, she became immediately entitled to her distributive share, although other children were not of age or married. *Overton* v. *Davy's Executor*, 273.
5. Where a will is impeached for undue influence exercised over the weak intellect of the testator, the inquiry is, not merely whether an undue influence was exerted *at the time* of the execution of the will, but whether an undue influence had been acquired, and operated upon the testator in the disposition of his property. *Taylor* v. *Wilburn*, 306.

WITNESS.

See EVIDENCE. JURORS, 1, 2.

1. A notary public has no power to commit a witness for refusing to produce books and papers under a *subpœna duces tecum*. *Ex parte Mallinkrodt*, 493.

WRIT OF ERROR.

See APPEAL.

1. Under the charter of the Hannibal and St. Joseph railroad company, (Sess. Acts 1847, p. 156,) a writ of error does not lie to the action of the judge of the circuit court upon the report of the viewers appointed to assess damages to individuals over whose land the road is run. The judgment entered upon the report is final. *Hannibal and St. Joseph Railroad Co.* v. *Morton*, 70.
2. A writ of error does not lie to the order of a county court removing a county seat. *Johnson* v. *Clark County Court*, 529.
3. The pendency of a writ of error in the supreme court of the United States does not affect the duration of the lien of a judgment of the circuit court. *Chouteau* v. *Nuckolls*, 442.

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